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No. _____

In the Supreme Court of the United States

October Term, 1992

Edward J. Petrus, Jr., M.D.
and
The Eye Center of Austin
Petitioners,

v.

Inspector General
Department of Health and Human Services
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the agency can retroactively apply a six-year statute of limitations for a Civil Monetary Penalty Law (CMPL) claim after the applicable five-year limit expired?

2. Whether a CMPL penalty after a criminal conviction and fine for the same conduct violates the Double Jeopardy Clause of the Fifth Amendment?

3. Whether the release of grand jury materials for use in a civil administrative hearing is a due process violation?

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Department of Health and Human Services
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On Petition for a Writ of Certiorari
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for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Edward J. Petrus, Jr. M.D. and the Eye Center of Austin, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Fifth Circuit and the Department of Health and Human Services.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, **Petrus v. Inspector General**, 966 F.2d 675 (5th Cir. 1992), affirming the Order of the Department of Health & Human Services (C-147, Dec. No. 1264) imposing a penalty and assessment against the Petitioners, is reproduced in Appendix A. The final decision on review of the agency's decision is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit affirming the CMPL penalty was filed on June 3, 1992 is reproduced in Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying the Petition for rehearing was filed on July 1, 1992, is reproduced in Appendix C. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and 42 U.S.C. § 1320a-7a(e).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

The Inspector General (IG) of DHHS sent Edward J. Petrus, Jr., M.D. (Petrus) a letter proposing to impose a penalty and assessment under the Civil Monetary Penalties Law (CMPL) on June 7, 1989. (IG-97). Petrus responded by noting the five-year statute of limitations expired, and that a civil penalty in addition to a criminal sanctions was double punishment. (Exhibit A-3, App.Br.). The Eye Center of Austin (Eye Center) was never served.[1] The IG obtained an ex parte release of grand jury

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[1]Fifth Circuit ruled that Petrus could not represent the Eye Center, because he is not a licensed attorney. **In re K.M.A., Inc.**, 652 F.2d 398, 399 (5th Cir. Unit B 1981). Petrus claimed that a defunct corporation may defend actions in

materials for use in an administrative hearing held on March 19-24, 1990.[2] Petrus filed a motion to dismiss the CMPL claim for abuse of grand jury process which was denied by the ALJ. The ALJ also refused to allow the admission of Petitioner's exhibits, refused postponement or consideration of Petitioner's health status, refused to release a medical report on Petrus, and demonstrated bias and prejudice by interfering with the Petitioner's questioning of witnesses and distracted the hearing with his admitted note passing with his assistant. (Exhibit A-8, App.Br.). Petitioners' motions that the ALJ disqualify himself were also denied. The ALJ filed an opinion against the Petitioners, jointly and severally,[3] in the amount of $180,000 on October 10, 1990, which was affirmed by the Appellate Panel of DHHS on July 5, 1991. Petitioners filed a notice of appeal on September 5, 1991,

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court without the benefit of counsel. **Regal Const. Co. v. Hansel**, 596 S.W.2d 150, 153 (Tex.Civ.App.-Houston [1st Dist]) re. denied 1980, quoting **Humble Oil & Refining Co. v. Blankenburg**, 149 Tex. 498, 235 S.W.2d 891 (1951). Appellate court did not address whether the agency obtained jurisdiction over the Eye Center. A copy of that decision is reproduced in Appendix D.

[2]The agency refused to release to the Petitioners a copy of their application for the ex parte release of grand jury materials. Their application and order releasing the grand jury materials was sealed by the court.

The issue of whether the agency qualified under Rule 6(e)(3), F.R.Cr.P. for the release of grand jury materials for use in a civil administrative hearing was presented to the Fifth Circuit, **In the Matter of: Grand Juries Impanelled 1/10/83, 6/01/83/, and 8/16/84**, (91-8096), which ruled on November 5, 1991, that relief could only be obtained by judicial review of agency's final decision.

[3]CMPL does not provide for joint and several liability, and prohibits vicarious liability. **Inspector General v. Frank P. Silver**, DAB No. C-19 (1988).

and oral argument was held on June 2, 1992.[4] Appellate Court affirmed the agency decision on June 3, 1992, and rehearing denied on July 1, 1992.

Petitioners were charged under the CMPL (42 U.S.C. § 1320a-7a) with violating: § 1320a-7a(a)(1)(A) for improperly filing claims for items or services that were not provided as claimed,[5] and § 1320a-7a(a)(1)(D) for claims submitted during a period of suspension.[6] The agency alleged that Petrus furnished services and identified other physicians as the provider, and that he provided those services while under suspension.[7]

The hearing testimony verified that all claims were compiled and submitted solely by Ms. Brooks, an employee of the Eye Center (Tr. 1153), who based the information for completing the claims from the bill (Tr. 1153, 1189), medical chart, handwriting, and her knowledge of which doctor treated the patient (Tr. 1189, 1198). Ms. Wilson, a receptionist at the Eye Center, stated that she knew which doctor treated the patient because the doctor brought the patient and chart back to her (Tr. 778), and

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[4] Petrus appeared pro se and was prevented from speaking for the Eye Center.

[5] The IG stated "[t]here was no evidence at the trial which suggested that Respondents billed for any services that were not in fact provided." (IG brief p.96). No claim was made that any patient was charged for services they did not receive, were charged for a more extensive service than they received, or were overcharged.

[6] Only the Eye Center submitted claims, and was never suspended.

[7] Such actions are not a violation of § 1320a-7a(a)(1)(A) or § 1320a-7a(a)(1)(D), and if true are only a violation of § 1320a-7a(a)(1)(B) which was not charged by the agency.

she and Ms. Brooks then filed the claim with the correct physician's provider number based on their personal knowledge. All the claim forms were signed by Ms. Brooks (Tr. 1155), and presented in the name of the Eye Center of Austin (Tr. 1199). Petrus never signed any claims (Tr.1200), did not participate in the preparation of claims (Tr. 1200), and never reviewed or changed any claims (Tr.835, 1159-60).

The Eye Center hired two physicians in 1983, while Petrus was on suspension from Medicare/Medicaid, to treat Medicare and Medicaid patients: Drs. Paul Malsky and Gregory Baer (Tr. 418, 434). The agency alleged that Petrus treated Medicare and Medicaid patients and used Dr Malsky or Dr. Baer's provider number on the claim. The basis of that allegation is the fact that some of the notes in the medical charts were not in the handwriting of Drs. Malsky or Baer, who alleged that they always wrote notes in the chart for patients they treated. Dr. Malsky stated under oath that he never had any incomplete medical charts (Tr. 646, 731-33), but Ms. Brooks and Ms. Wilson both stated under oath that he frequently left the medical charts incomplete (Tr.1190-91), which were later completed by Petrus. When the charts were examined at a later date, the handwriting was that of Petrus (Tr.642, 522). Dr. Malsky also billed Medicare from his Killeen office for the same services billed from the Eye Center (Tr.1549). Dr. Malsky was visited by an investigator for DHHS after noting his double billing (Tr.506), and following that visit more medical charts were left incomplete (Tr.814-15).

When Ms. Brooks was asked by ALJ Kessel "When you say that the charts were not completed by Dr. Malsky, what was it that he would leave out?" Ms. Brooks stated "What he did to the patient." (Tr.1197-98). Dr. Malksy testified during the hearing and grand jury that if the writing in the medical chart was not in his handwriting, he didn't treat the patient (Tr.522). Dr. Baer,

under oath before the grand jury and agency hearing, testified that he always completed his medical charts, but when questioned about his incomplete medical charts at the hearing admitted, "I didn't write on the surgical record. I didn't write on the patient's chart. I didn't write anywhere. You did all of that." (Tr.350). The agency claimed that Petrus actually treated the patients while on suspension and used the other physician's provider number on the claim forms. Such action, if true, is not a violation of either § 1320a-7a(a)(1)(A) or (D) of the CMPL.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Supreme Court regarding retroactivity of Medicare statutes.

The Fifth Circuit erred when it rendered a McJudgment and "affirmed" the final decision of the Department of Health & Human Services. The agency decision retroactively applied a statute of limitations to the Medicare Act contrary to the Court's ruling in **Bowen v. Georgetown University Hospital**, 109 S.Ct 468 (1988).

The agency charged that claims filed by the Eye Center, from June 1983 until February 1984, were improperly filed. A CMPL charge, against the Petitioners, was docketed on August 17, 1989,[8] and exceeded the five-year statute of limitations by five months. The agency erred when it ruled that the claims are

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[8]Rule 3, F.R.Civ.P., states that "A civil action is commenced by filing a complaint with the court." After filing the complaint, the action is pending until a "summons and complaint shall be served together." Rule 4(d). The IG failed to serve the summons and complaint within 120 days and this CMPL complaint should be dismissed. Rule 4(j), F.R.Civ.P.

governed by a six-year statute of limitations.

The IG admitted that the statute of limitations rests upon their interpretation of the "plain language of Section 15." (HHS Br. p.23). Section 15. Effective Dates[9] clearly states under "Claims" that the effective date of the new six-year statute of limitations shall "*apply to claims presented on or after the effective date specified in subsection (a)...*" The Act became effective on September 1, 1987, therefore the new six-year statute of limitations applies only to claims presented on or after that date. The IG admits that the claims were presented for payment by the Eye Center from June 8, 1983 to February 27, 1984 (HHS Br. p.21), and thus is *only covered by the five-year statute of limitations.*

The Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a (1983) had a five year statute of limitations for claims filed prior to 1987. (48 FR 38827, August 26, 1983).

> We have included final § 101.132, which bars the Department from proceeding against a party for violations concerning which a right of action has accrued more than five years before the filing of a Notice of Proposed Determination as provided in § 101.109(a).
>
> ...statutes are presumed to operate prospectively. (48 FR 38828).

The CMPL was revised on September 30, 1986, and continued to have a five year statute of limitations. (51 FR 34777). The

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[9]Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 15(a)-(e), 101 Stat. 698, refers to the CMPL and is reproduced in part in Appendix E.

statute of limitations was changed to 6 years on December 31, 1987, for all violations that occur *after* that date. (52 FR 48412). The agency stated in the Federal Register on December 31, 1987 that:

> Those regulations at 42 CFR 1003.182 currently provide that "no action under this part shall be entertained unless commenced pursuant to § 1003.109(a) of this part, within 5 years from the date on which the right of action accrued."

The last "date on which the right of action accrued" was January 21, 1984, therefore the agency was without authority to act after January 22, 1989, and lacked subject matter jurisdiction.

Statutes of limitation are construed prospective, and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. **Russell v. United States**, 278 U.S. 181 (1929); **United States v. St. Louis S. F. & T. R. Co.**, 270 U.S. 1 (1925). Thus, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations, will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law. All legislation must be applied prospectively. The Supreme Court in **Union Pacific Railroad Co. v. Laramie Stock Yards Co.**, 231 U.S. 190 (1913) declared:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past.

The Court ruled against the retroactive application of statutes.

There is a substantive element, in the operation of a limitation statute, that is the protection of potential defendants from a protracted fear of litigation. **Pearson v. Northeast Airlines Inc.**, 309 F.2d 553 (2nd Cir. 1962). The **Russell** Court held against a retroactive change of a five year statute of limitations which had almost expired and quoted **United States v. Magnolia Petroleum Co.**, 276 U.S. 160, 162 (1927) that

> Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.

Russell, 276 U.S. at 187.

The legislature in § 15 of Pub.L. 100-93, enacted December 31, 1987, specifically refer to the prospective application of effective dates. DHHS published their *final rule* regarding 42 CFR Part 1003. The agency adheres to the principles of the Administrative Procedure Act (APA), which defines "rule" to mean "the whole or part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the *future*."

The ALJ cited **Bernstein v. Sullivan**, 914 F.2d 1395 (10th Cir. 1990) to support their claim for the retroactive application of a six-year statute of limitations. **Bernstein** is distinct in that Bernstein was indicted for services he did not perform, and before the five-year statute expired signed an agreement with the IG which tolled the running of the five-year statute of limitations. Following a decision by the ALJ that the new six-year statute would apply to any action initiated after September 1, 1987, both

parties agreed that the ALJ could enter judgment against Bernstein. Such actions by Bernstein waived his constitutional claims. **Bernstein** is clearly distinguished from the present case.

A Fifth Circuit opinion regarding CMPL, **Griffon v. United States Dept. of Health and Human Services**, 802 F.2d 146 (5th Cir. 1986), ruled that CMPL could not be applied retroactively to acts of fraud committed before the Act's effective date. The Court noted:

> On August 13, 1981, Congress passed the CMPL, a civil statute providing monetary penalties for individuals who file false Medicare or Medicaid claims. Congress passed the CMPL, as an alternative procedure to existing federal and state enforcement mechanisms, after determining that those mechanisms were inadequate to combat the increasing incidence of Medicare fraud.

The Court in footnote 5 noted that "[t]he CMPL, thus was 'intended to provide an alternative to criminal proceedings." The Court noted that "[o]n December 30, 1982, the Secretary of HHS promulgated proposed rules for implementing the statute by notice and comment in the Federal Register. 47 Fed. Reg. 58,309 (1982) "and that [t]he Secretary recognized that *Congress did not specifically make 42 U.S.C. § 1320a-7a retroactive*" but that "the CMPL as conceived as an alternative remedy to criminal prosecution of cases of fraud, which were not being prosecuted' 48 Fed. Reg. 38,828 (1983)." *Id* at 150. Thus "Congress generally intended the CMPL to be a procedural, civil alternative to ameliorate the pattern of underenforcement of criminal statutes." *Id*. at 151. The Court decided against retroactively applying procedural aspects of the CMPL and held that:

> the only question presented was purely one of law, namely, whether the regulations of the Secretary of Health and Human Services retroactively applying the procedural aspects of the Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a, were consistent with that statute...we held they were not.

Griffon, 832 F.2d at 52.

This Court resolved the issue of retroactivity of Medicare statutes in **Bowen** stating that "the threshold question is whether the Medicare Act authorizes retroactive rulemaking." The Court ruled that the APA, as a general matter, forbids retroactive rulemaking and the Medicare Act, by specific terms, bars retroactive rules. Justice Scalia, in a concurring opinion noted that "[t]he first part of the APA's definition of "rule" states that a rule" has only a "future effect" and that "rules have legal consequences only for the future." He went on to note that "[q]uite simply, a rule is an agency statement 'of future effect' not 'of future effect and/or reasonable past effect'" and that "[r]etroactive legislation has always been looked upon with disfavor." Thus, the revision of the statute of limitations in 1987, has no effect on the preexisting five year statute of limitations in effect in 1984, and the agency has no authority to pursue any penalty from the Petitioners.

II. The Court of Appeals for the Fifth Circuit has affirmed an agency decision regarding the issue of double jeopardy for criminal and civil punishment for the same offense contrary to their prior decisions and in conflict with a decision of this Court.

The Fifth Circuit erred when it affirmed the final decision of the agency which held that the criminal conviction and civil

penalty was not double jeopardy. The agency decision is inconsistent with their decision in **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991), and in conflict with this Court's decision in **United States v. Halper**, 490 U.S. 435, 109 S.Ct. 1892 (1989).

Petrus was incarcerated and fined $55,000 for claims submitted in 1983. In 1989, the IG claimed $180,000 penalty for the same conduct. The court erred when is held that the double punishment does not violate the Double Jeopardy Clause of the Fifth Amendment.

This Court in **United States v. Halper**, 490 U.S. 435, 109 S.Ct. 1892, 1903 (1989), held that:

> In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct, and receive a judgment that is not rationally related to the goal of making the Government whole.

The agency refused to document any dollar loss to the government, and refused to prove any damages. The Fifth Circuit in **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991) held that the rationale underlying the double jeopardy clause is that the sovereign, with all its power and resources, should not be permitted to subject a defendant to embarrassment, expense and ordeal by repeated attempts to convict for alleged offenses; that the double jeopardy protection applies to felonies, minor crimes and misdemeanors alike; and that criminal fines are treated in the same manner as prison sentences for purposes of double jeopardy and multiple punishment analysis.

Sanchez-Escareno, quoting **Halper,** ruled that "the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." **Halper** maintained that CMPL damages are limited to the amount of fraud itself,[10] and ancillary costs, such as the costs of detection and investigation.[11] The agency declined to document any loss to the Government, therefore any penalty assessed against the Petitioners is not remedial but constitutes a second punishment and violates the Double Jeopardy Clause of the Fifth Amendment.

III. The Court of Appeals affirmed an agency decision regarding the release of grand jury materials contrary to their prior decisions, and contrary to the applicable decisions of this Court.

The Fifth Circuit erred when it affirmed the final decision of the agency which held that grand jury materials can be released in a civil administrative hearing. The appellate decision is counter the their decision **In re J. Ray McDermott & Co., Inc.,** 622 F.2d 166 (5th Cir. 1980), and in conflict with this Court's decision in **United States v. Baggot**, 463 U.S. 476 (1983)

The agency sought and obtained an ex parte release of grand jury materials for use in a civil administrative hearing in violation of Rule 6, F.R.Cr.P. Grand Jury secrecy is maintained

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[10] Actual damages are limited to items or services which were not provided, but the Inspector General admits that all the items or services were provided. (IG Br. p.96).

[11] There are no valid documented costs of detection and investigation, because the IG denied that any costs of detection and investigation existed in the December 6, 1989 discovery request. (R-63, Exhibit #2).

under Rule 6(e), F.R.Cr.P. but may be disclosed under Rule 6(e)(3) Exceptions.[12] The (C)(i) disclosure requires the release of grand jury materials "preliminarily to or in connection with a judicial proceeding." The Fifth Circuit **In Re J. Ray McDermott & Co., Inc.**, 622 F.2d 166 (5th Cir. 1980) held that where a judicial proceeding by a government agency is only a possibility, the agency is not entitled to disclosure of matters occurring before a federal grand jury under the "judicial proceedings" exception. The Court in **United States v. Young**, 494 F. Supp. 57 (E.D. Texas 1980) discussed at great length the release of grand jury materials in an administrative hearing. The Court held that the rule authorizing disclosure of grand jury material, in the phrase "preliminarily to or in connection with a judicial proceeding" should, at least, mean that requested grand jury material will be used in preparation for judicial proceeding that is more than a remote possibility, and thus plans to hold administrative hearing would not alone justify production of requested transcripts. The

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[12] Federal Rule Criminal Procedure 6(e)

(3) Exceptions -

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to -

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Court also noted:

> Application of Rule 6 should not become a game in which parties secure release of grand jury material for use in a non-judicial proceeding merely by showing some relationship between a non-judicial proceeding and future judicial proceeding.

494 F. Supp. at 60.

Some courts have interpreted "judicial proceeding" to mean only a proceeding in a United States District Court. See, **United States v. Downey**, 195 F.Supp. 581, 584 (D.C. Ill. 1961); **United States v. Crolich**, 101 F. Supp. 782, 784 (D.C. Ala. 1952). Other courts have construed that "judicial proceeding" does not apply to an administrative proceeding or investigation. See, **In re J. Ray McDermott & Co.**, 622 F.2d 166 (5th Cir. 1980); **United States v. Young**, 494 F. Supp. 57 (D.C. Tex. 1980); **In re Special February, 1975 Grand Jury**, 662 F.2d 1232 (7th Cir. 1981); **United States v. Bates**, 627 F.2d 349 (D.C. Cir. 1980).

This Court in, **United States v. Baggot**, 463 U.S. 476 (1983), considered what is meant by the words "preliminarily to or in connection with a judicial proceeding" in Rule 6(e)(3)(C)(i). The Court held that this does not include disclosure of grand jury material to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and to assess any tax deficiency. Justice Brennan, writing for the Court, said that the words just quoted from the Rule are "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." "If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted." The Court went on to note, "It follows that disclosure is not appropriate for use in an IRS audit of civil

tax liability, because the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." 463 at 480.

The IG in the administrative cause was not using the grand jury materials to conduct litigation, but to assess a penalty under the CMPL in an administrative hearing, therefore disclosure under (C)(i) is not permitted according to the **Baggot** Court decision.

CONCLUSION

For all the foregoing reasons, Petitioners Edward J. Petrus, Jr., M.D. and the Eye Center of Austin, respectfully pray that their petition for writ of certiorari be granted in order for this Court to review the judgments and opinion of the United States of Appeals for the Fifth Circuit.

Respectfully submitted,

Edward J. Petrus, Jr., M.D.
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(512) 454-6500
Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by United States mail, on the 28th day of September, 1992

Edward J. Petrus, Jr., M.D.

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APPENDIX E

Section 15, Effective Dates, 1987

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-4761

EDWARD J. PETRUS, JR., MD.
Petitioners,

v.

INSPECTOR GENERAL, DEPARTMENT
OF HEALTH & HUMAN SERVICES
Respondent

Petition for Review of an Order of the
Department of Health & Human Services
(C-147) (Decision 1264)

Before HILL, KING and DAVIS, Circuit Judges

PER CURIAM

AFFIRMED

FILED June 3, 1992.

APPENDIX B

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

In the Case of: DATE: July 5, 1991

The Inspector General Docket No. C-147
Decision No. 1264

- v. -

Edward J. Petrus, Jr., M.D.,
and
The Eye Center of Austin,
Respondents.

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Dr. Edward J. Petrus, Jr. and The Eye Center of Austin (Respondents) requested review by the Appellate Panel of an October 10, 1990 decision by Administrative Law Judge (ALJ) Steven T. Kessel. See The Inspector General v. Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB Civ. Rem. C-147 (1990) (hereafter, the ALJ's Decision). The ALJ's Decision affirmed a determination by the Inspector General (I.G.) that the Respondents had violated section 1128A of the Social Security Act (Act). The ALJ imposed $180,000 in penalties and assessments against the Respondents, jointly and severally.

SUMMARY OF OUR DECISION

Section 1128A of the Act, referred to as the Civil Monetary Penalties Law (CMPL), authorizes imposition of penalties and assessments on persons who submit false claims to the Medicare program or State health care programs (Medicaid) or who engage in other activities which adversely affect the

integrity of the program or the quality of care provided. Section 1128A(a) establishes liability for any person that--

(1) presents or causes to be presented . . . a claim . . . that the Secretary determines--

(A) is for a medical or other item or service that the person knows or should know was not provided as claimed,

* * *

or,

(D) is for a medical or other item or service furnished during a period in which the person was excluded from the program under which the claim was made . . . 1/

The ALJ found the Respondents liable with respect to 271 items or services (counts) under paragraph (D) and, alternatively, liable for 174 of those counts under paragraph (A). The crux of the ALJ's decision was that--

o The Respondents presented or caused to be presented claims for Medicare or Medicaid payments for 271 items or services furnished by Dr. Petrus during a period when he was excluded from participating in those programs; and

o The Respondents presented or caused to be presented claims for Medicare or Medicaid payments for 174 items or services which identified other physicians as the provider even though they were in fact furnished by Dr. Petrus, and that the Respondents knew, had reason to know, or should have known that these items or services were not provided as claimed.

1/ As the ALJ noted, the provision now at paragraph D appeared at paragraph B prior to amendments made in 1987, which did not change the intent or scope of the law in any way relevant here. ALJ's Decision at 39, n.11. We also note that the Act previously used the term "suspension," rather than "exclusion," when a person was barred from participating in a program because convicted of a program-related crime.

The ALJ found that the evidence supporting liability was credible and uncontradicted, and his decision contains a careful examination of his reasons for rejecting the Respondents' allegations. ALJ's Decision at 34-43. In determining the amount of the penalties and assessments, the ALJ considered certain aggravating factors and determined that there was no evidence of any mitigating factor. The most compelling aggravating factor was that the Respondents had deliberately schemed to circumvent the effects of the suspension (for example, by instructing employees to resubmit claims for items or services furnished by Dr. Petrus as though they had been provided by another physician).

On appeal to us, the Respondents submitted a lengthy brief, challenging the ALJ's resolution of various legal issues, the ALJ's rulings on evidentiary matters, and the ALJ's impartiality. The Respondent took exception to numerous specific Findings of Fact and Conclusions of Law (FFCLs) set out in the ALJ's Decision.

For the reasons summarized here and explained in detail below, we affirm the ALJ's Decision (although we make a few technical modifications to the FFCLs). In affirming and adopting the FFCLs, as modified, we conclude that the ALJ's factual findings are supported by substantial evidence in the record and that the ALJ reasonably determined that, where required, the I.G. met his burden of proving facts by a preponderance of the evidence.

The Respondents' arguments represent, for the most part, collateral or procedural attacks on the ALJ's Decision and are based on a convoluted and erroneous analysis of the law or on statements of fact supported only by the Respondents' assertions and not by any evidence properly in the record. We address these arguments below and state in detail our reasons for rejecting them. In particular, we note here that there is no evidence that the ALJ was biased or that he failed to provide the Respondents a fair hearing. To the contrary, the record

amply supports a conclusion that the ALJ afforded the Respondents extra leeway in presenting their case (since they appeared pro se) and imposed penalties and assessments less than what might have been warranted under the circumstances.

We emphasize here, moreover, that relatively few of the Respondents' arguments on appeal address the key issues of their liability under the CMPL. Their major arguments which did relate to liability, and our reasons for rejecting those arguments, may be summarized as follows:

o The Respondents argued that they were liable only if the items or services were "not provided" and that there was no finding here that the items or services were not provided to the program recipients. We conclude that 174 items or services were "not provided as claimed" within the plain meaning of section 1128A(a)(1)(A) since the physician was misrepresented on the claim form. We further conclude that the Respondents would, in any event, be liable under section 1128A(a)(1)(D) for all 271 items or services.2/

o The Respondents argued that the ALJ failed to recognize that The Eye Center of Austin (Eye Center) was not suspended from participating in the programs. This fact is irrelevant, however. The effect of Dr. Petrus' suspension was that no payment could be made under Medicare or Medicaid for services furnished by him and strict liability attached under section 1128A(a)(1)(D) to any person (including an entity like the Eye Center) who presented or caused to be presented

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2/ We note that, in summarizing his conclusion on page 1 of his decision, the ALJ appeared to be saying that liability for all 271 counts was under paragraph (A). An examination of his numbered FFCLs and his discussion of the issues, however, shows that he found liability for 174 counts under paragraph (A) and for all 271 counts under paragraph (D). See ALJ's Decision at 18, 23-25, 39-43.

claims for services furnished by him during the period of suspension.

o The Respondents asserted that Dr. Petrus did not know before June 1983 that his suspension became effective May 12, 1983. The testimony (by an employee of the Eye Center) which the Respondents cited shows only when that employee learned of the suspension and is therefore irrelevant. It is reasonable to infer from the documentary evidence cited by the ALJ that Dr. Petrus knew the effective date at least by the time the claims at issue here were presented. The Respondents cited to nothing which would indicate that the precise date Dr. Petrus knew had to be established as a prerequisite to liability under either paragraph (A) or (D) of section 1128A(a)(1).

o The Respondents attacked the ALJ's finding that Dr. Petrus had instructed his office staff to falsify claims. This attack misconstrues certain testimony by taking it out of context or mischaracterizes as testimony questions asked by Dr. Petrus at the hearing.

o The Respondents challenged the bases for the ALJ's findings to the effect that Dr. Petrus, rather than other physicians who worked for the Eye Center, had provided certain items and services. The ALJ's findings were based on his evaluation of the credibility of witnesses; the transcript citations relied on by the Respondents are either misread by them or are irrelevant.

Below, we first provide background information necessary to enable the reader to understand our decision. In Part I of our analysis, we address general issues raised by the Respondents, and in Part II we address their exceptions to specific FFCLs. In Part III, we address certain technical revisions and corrections to the FFCLs proposed by the I.G. (which resulted in the modified FFCLs which we include as an Appendix to our decision).

BACKGROUND

Case History 3/

Dr. Petrus, an ophthalmologist who practiced in Austin, Texas, was the sole owner and operator of the Eye Center, a professional corporation, during the period May 12, 1983 through January 21, 1984.

On December 21, 1979 Dr. Petrus was convicted of a criminal offense related to his participation in the Texas Medicaid program. On June 10, 1982, the I.G. notified Dr. Petrus that he would be suspended from participating in Medicare and Medicaid pursuant to section 1128(a) of the Act, based on the 1979 conviction. The notice of suspension informed Dr. Petrus that after the suspension became effective, no payments would be made for items or services he furnished either directly, or as an employee of a provider of services. Dr. Petrus obtained a temporary restraining order and preliminary injunction prohibiting the suspension from going into effect.

Dr. Petrus and the Department of Health and Human Services eventually entered into a settlement agreement. Under the terms of the agreement, Dr. Petrus would be suspended from Medicaid and Medicare for six months. The suspension would become effective seven days after the date a court order was signed and entered dissolving the preliminary injunction. The preliminary injunction was dissolved on May 5, 1983. Dr. Petrus' suspension became effective May 12, 1983.

The implementing regulations then in effect provided that the reinstatement of a party suspended from Medicare was not automatic. Rather, a suspended party was required to apply, and satisfy certain criteria, for reinstatement to Medicare and Medicaid. See 42 C.F.R. 420.112, 420.120, and 455.212(e)

3/ This summary of the facts is not intended as a substitute for the more detailed factual statements in the FFCLs.

(1982); 42 C.F.R. 420.130, 420.132, and 455.230-455.234 (1983).4/ On August 12, 1983, Dr. Petrus requested reinstatement after his six-month suspension. In November 1983 he was informed that his request was under review. At that time Dr. Petrus and the Eye Center were the subject of another investigation by the I.G. The I.G. eventually denied Dr. Petrus' request for reinstatement.

From June through October 1983, Dr. Paul Malsky worked at the Eye Center. From November 1983 through January 1984, Dr. Gregory Baer worked at the Eye Center. Both doctors were assigned Medicare and Medicaid identification (provider) numbers. At the time they were hired, neither doctor was aware of Dr. Petrus' suspension from Medicare and Medicaid. During their individual terms of employment, Doctors Malsky and Baer were the only physicians, other than Dr. Petrus, working at the Eye Center.

In 1984, a federal grand jury began an investigation of Medicare and Medicaid claims submitted by Dr. Petrus and the Eye Center after May 12, 1983 (the effective date of his suspension). On October 19, 1984, Dr. Petrus was indicted in federal court on charges of Medicare and Medicaid fraud and obstruction of justice.

On May 2, 1985, Dr. Petrus pled guilty to one count of Medicare fraud involving two items or services and one count of Medicaid fraud involving four items or services. Additionally, Dr. Petrus pled guilty to one count of obstruction of justice relating to his efforts to impede the grand jury investigation.

4/ The ALJ cited the 1986 version of the regulations, which is substantially the same as the versions in effect during the relevant time period. ALJ's Decision at 4; FFCL Nos. 16, 17, and 18, citing 42 C.F.R. 1001.130, 1001.132. We modify FFCL Nos. 16, 17, and 18 to reflect the appropriate citations, as indicated in the Appendix to this decision.

As a result of this second conviction, Dr. Petrus was suspended from participation in Medicare and Medicaid for 25 years. The Eye Center was also suspended for 25 years.

On June 7, 1989, the I.G. notified the Respondents of his intention to impose against them, jointly and severally, a civil monetary penalty of $293,500 and an assessment of $80,810 (for a total of $374,310). The I.G. alleged that the Respondents had presented, or caused to be presented, to the contractors responsible for processing Texas' Medicare claims and the State's Medicaid agency, claims for 275 items or services in violation of the CMPL.5/

Specifically, the I.G. charged that the Respondents had presented or caused to be presented claims for items and services provided by Dr. Petrus during his suspension from Medicare and Medicaid. Additionally, the I.G. charged that the Respondents had presented, or caused to be presented, claims for items or services which identified as the provider a physician other than Dr. Petrus (i.e., either Dr. Malsky or Dr. Baer) but which were, in fact, provided by Dr. Petrus.

The I.G. proposed $374,310 in penalties and assessments, against the Respondents. Discussing the factors considered in determining this amount, the I.G. indicated that there were no mitigating factors that would work in the Respondents' favor. However, the I.G. noted that, since the Respondents had already been suspended from participation in Medicare and Medicaid for 25 years as a result of Dr. Petrus' 1985 plea agreement, the I.G. had decided not to seek any additional period of exclusion. On August 8, 1989, the Respondents requested a hearing before an ALJ. The ALJ held a hearing and issued his decision on October 10, 1990.

5/ The I.G. ultimately withdrew its allegation with respect to four counts.

Summary of the ALJ's Decision

The ALJ's Decision was supported by 230 FFCLs. The ALJ identified the principal issues as whether:

1. The six-year statute of limitations provided in section 1128A(c)(1) of the Act applies to the claims for items or services at issue.

2. Assuming the six-year statute of limitations applies, the I.G. initiated a proceeding against Respondents not later than six years after the claims at issue were presented.

3. Rulings on the admissibility of evidence in this case violated Respondents' due process rights.

4. Denial of Respondents' motion to postpone the hearing was unfair to Respondents.

5. Respondents presented or caused to be presented claims for items or services in violation of section 1128A of the Act.

6. Assessments and penalties should be imposed against Respondents and, if so, in what amounts.

7. The penalties and assessment imposed in this case violate Respondents' rights not to be placed in double jeopardy.

ALJ's Decision at 1-2.

Generally, the ALJ determined that the six-year statute of limitations in section 1128A of the Act applied to the claims for items or services in issue and that the I.G. had initiated an action against the Respondents not later than six years after those claims were presented. The ALJ also determined that his rulings on the admissibility of evidence did not violate the Respondents' due process rights, and that his denial of the Respondents' motion to postpone the hearing was not unfair to

them. The ALJ found that the Respondents presented or caused to be presented claims for 271 items or services in violation of section 1128A of the Act and, therefore, penalties and assessments were appropriate. Finally, the ALJ rejected the Respondents' argument that the penalties and assessments imposed in this case violated their rights not to be placed in double jeopardy.

The ALJ imposed penalties ($100,000) and assessments ($80,000) jointly and severally against the Respondents. However, the penalties and assessments were in amounts lower than those originally sought by the I.G.

The Respondents' Exceptions

The Respondents timely filed exceptions to the ALJ's Decision on November 2, 1990. Generally, the Respondents challenged the ALJ's determinations relative to each of the seven issues addressed by the ALJ. By doing so, the Respondents implicitly attacked certain FFCLs which served as the bases for his analysis of those issues. Additionally, the Respondents (referring to themselves as Petitioners) enumerated specific exceptions, prefacing their exceptions with the following statement:

The Petitioners, without waiving the objections tendered by Petitioner Petrus at the hearing, or admitting any of the allegations or findings made by the IG and/or ALJ, respectfully tender several alternative arguments. Petitioners contend that: (1) the ALJ erred because his decisions are contrary to the plain language of the Act; (2) the ALJ did not take into consideration the mitigating factors introduced into evidence at the hearing; (3) the ALJ made findings of fact that were not based upon substantial evidence; (4) the ALJ did not apply the correct standard of liability to each Petitioner. These exceptions are addressed to the most outrageous findings of fact and conclusions of law, and the decision not to address all of the findings does not signify that the Petitioners accept

them, but their inaccuracy is addressed in other documents . . . .Respondents' Brief6/ (Br.) at 41.

The Respondents took specific exception to 161 of the 230 FFCLs. In some instances, the Respondents' arguments regarding specific exceptions repeated arguments previously made relative to the broader issues.

The I.G.'s Proposed Exceptions

On December 5, 1990, the I.G. filed "The Inspector General's Response to Respondents' Exceptions." Aside from answering the Respondents' exceptions, this document also contained proposed exceptions, as well as proposed revisions and corrections to the ALJ's FFCLs.

On December 12, 1990, the ALJ issued a "Decision Dismissing Inspector General's Proposed Exceptions to Administrative Law Judge's Decision." There, the ALJ ruled that while the I.G.'s responses to the Respondents' exceptions were timely filed, the I.G.'s exceptions were not. Consequently, the ALJ dismissed the I.G.'s exceptions.

Regarding the I.G.'s proposed revisions and corrections, the ALJ determined that they did not rise to the level of exceptions. Thus, he did not dismiss them as exceptions filed out of time. Id. at 3.

In our Determination to Accept Review (December 20, 1990), we found that the I.G.'s exceptions were untimely under the requirements of 42 C.F.R. 1003.125(d) and properly dismissed by the ALJ. Thus, our analysis does not consider the I.G.'s

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6/ We use the generic term "brief" in reference to both the Respondents' exceptions and the I.G.'s response to them.

proposed exceptions. However, as noted below, we do address the I.G.'s proposed revisions and corrections.

ANALYSIS

I. The Respondents' General Exceptions

1. The ALJ correctly determined that the six-year statute of limitations provided in section 1128A(c)(1) of the Act applies to the claims for items or services at issue.

At issue here is FFCL No. 35, which provides--

35. The I.G. may initiate an action under section 1128A of the Social Security Act within six years of the date that a claim at issue was presented.
ALJ's Decision at 6.7/

The Respondents asserted that the I.G. lacked the jurisdiction to file a complaint against them in 1989. The Respondents' position is based on their assertions that the CMPL had a five-year statute of limitations for claims submitted prior to 1987, that the claims at issue were submitted between May 12, 1983 and January 21, 1984, and that the I.G.'s action was not initiated until June 1989, more than five years after the latest submission of the claims.

On February 6, 1990, the ALJ ruled that the six-year statute of limitations applies in this case. The ALJ noted that on August 18, 1987, the CMPL had been amended to include a six-year statute of limitations pursuant to section 3(b) of the Medicare and Medicaid Patient and Program Protection Act

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7/ Throughout this decision, we omit the ALJ's citations to the Act, regulations, other FFCLs, or the record before him from our restatement of his FFCLs.

(MMPPPA).8/ Section 15(a) of the MMPPPA provided that all its amendments to the CMPL, except for those specifically given prospective application, "shall become effective at the end of the fourteen day period [September 1, 1987] after enactment" and "shall not apply to administrative proceedings commenced before the end of such period." This statute of limitations was subsequently incorporated into a revision of the CMPL regulations at 42 C.F.R. 1003.132. See 52 Fed. Reg. 49412 (December 31, 1987); see also ALJ's Ruling on Respondents' Motions (February 6, 1990) at 2-3.

The ALJ's Decision affirmed his February 6th ruling on the period of limitations to be applied. He noted that, prior to August 18, 1987, section 1128A of the Act did not contain a statute of limitations. Rather, the version of 42 C.F.R. 1003.132 then in effect provided a five-year period of limitations for section 1128A cases. Thus, the ALJ concluded, the "statute of limitations" cited by the Respondents was a regulatory creation which was superseded by the MMPPPA statutory provision.

In their exceptions, the Respondents reiterated their contention that the CMPL, as applied to their situation, is governed by a five-year "statute of limitations." The Respondents asserted generally that administrative rules were not intended to have retroactive application and that the Medicare Act specifically prohibited retroactive rules. Further, the Respondents argued that application of the six-year statute of limitations violated the ex post facto clause of the Constitution, and that the deterrence envisioned by the CMPL mandates prospective, rather than retrospective, application of the six-year statute of limitations. Respondents' Br. at 2-11.

The ALJ's determination that the Respondents' case is not governed by the five-year limitation is correct. In

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8/ Pub. L. 100-93, 101 Stat. 680 (1987).

Bernstein v. Sullivan, 914 F.2d 1395 (10th Cir. 1990), issued after the ALJ's Decision here, the court reached a similar result.9/

Bernstein involved facts which, if anything, were more favorable to the plaintiff than the facts here. There, the regulatory five-year period of limitations had lapsed, without any action by the I.G., by June 27, 1987. The amendments creating the six-year limitation for CMPL became effective on September 1, 1987. Approximately five months later the I.G. brought a CMPL action against Dr. Bernstein. The ALJ upheld the I.G.'s action and Dr. Bernstein took exception based on the statute of limitations set out at 42 C.F.R. 1003.132.

In its analysis, the court recognized that prior to 1987 Congress had not established a specific statute of limitations within which the Secretary could initiate an action under the CMPL. Rather, the Secretary applied the regulatory five-year period. Bernstein at 1397. The court interpreted the amendment to section 1128A(c)(1) as "authorizing the Secretary to initiate an action with respect to any claim or request for payment at any time up to six years after the claim for reimbursement was presented or a request for payment was made." The court said that the language of the 1987 amendment, prohibiting its application to proceedings commenced before the amendments' September 1, 1987 effective date, "strongly" suggested that the six-year limitation was intended to apply to proceedings initiated after that date. Id. at 1399. The court indicated that in applying the six-year statute of limitations the Secretary was following the "plain meaning" of the 1987 amendment.

The court also determined that application of the six-year statute of limitation did not violate Dr. Bernstein's

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9/ See Donald O. Bernstein, DAB Civ. Rem. C-40 (1989), DAB App. Rev. denied, (1989).

constitutional rights. The court placed primary reliance on Campbell v. Holt, 115 U.S. 620 (1885), where the Supreme Court stated that it did "not understand that a right to defeat a just debt by the statute of limitations is a vested right . . . [rather,] no right is destroyed when the law restores a remedy which had been lost." Id. at 628; see Bernstein at 1400.

The court also distinguished an earlier CMPL case, Griffon v. U.S. Dept. of Health and Human Services, 802 F.2d. 146 (5th Cir. 1986), relied on by the Respondents here for the proposition that the CMPL could not be applied retroactively. As the Bernstein court noted, Griffon involved the substantive CMPL provisions rather than the statute of limitations. Bernstein at 1402-1403. Therefore, Griffon does not support the Respondents' arguments on this issue. Similarly, the Supreme Court decision in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), is distinguishable because it involved retroactive application of a Medicare regulation which changed the plaintiff's substantive rights. Here, not only was there no right or expectation destroyed, but the I.G. had never lost its remedy; before five years had expired, the six-year statute had been enacted and the regulation had been amended to provide a six-year period for the I.G. to initiate an action.

The Respondents, relying on United States v. Halper, 490 U.S. 435 (1989), also characterized the CMPL as a quasi-criminal statute for the purpose of asserting that the six-year statute of limitations, as applied, violated the ex post facto clause at Article I, Section 10 of the Constitution.

We consider the Halper decision more fully later in this analysis. For our purposes here, it is sufficient to note that in Halper the Supreme Court announced "a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages . . . caused." Id. at 449. The Court recognized that a civil sanction which serves the goal of

punishment, rather than merely making the Government whole, could constitute "punishment" for purposes of invoking constitutional protection. Id. at 450-451.

The Respondents' reliance on Halper is premised on an overbroad reading of that decision. Halper was a narrowly drawn decision which clearly did not have the effect of transforming the CMPL into a criminal statute.10/ Moreover, this Board has previously considered and rejected the argument that application of the 1987 MMPPPA amendments to acts occurring before the effective date of the amendments violated the ex post facto clause. See Betsy Chua, M.D. and Betsy Chua. M.D., S.C., DAB No. 1204 (1990).11/

Finally, we reject the Respondents' argument that applying the six-year statute of limitations to this action is inconsistent with the purpose of the CMPL provisions to deter fraud. To the contrary, it would frustrate the deterrent effect of the CMPL to excuse individuals like the Respondents, who have engaged in fraudulent activities, merely because they may have thought an I.G. action would be barred after five years. Accordingly, we conclude that the ALJ properly applied the six-year statute of

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10/ The Bernstein court identified the CMPL, in general, as "a civil proceeding, not a criminal or quasi-criminal proceeding." Id. at 1397; in accord, Mayers v. U.S. Dept.of Health and Human Services, 806 F.2d 995 (11th Cir. 1986), cert. denied, 484 U.S. 822 (1987).

11/ Although Chua involved a mandatory exclusion under section 1128 of the Act, our rationale as to the prospective application of the amendments applies equally here.

limitations to this case.12/ Consequently, we affirm and adopt the ALJ's FFCL No. 35.

2. The I.G. initiated an action against the Respondents not later than six years after the claims at issue were presented.

Although the Respondents did not take specific exception to the FFCLs relative to this issue, the FFCLs which we must consider as part of our analysis are--

25. On June 7, 1989, the I.G. sent a notice to the Respondents alleging that they had presented or caused to be presented claims for 275 items or services in violation of the Civil Monetary Penalties Law, section 1128A of the Social Security Act.

34. The earliest date when any of the items or services at issue were received for processing by Blue Cross or by NHIC was June 8, 1983.

12/ In attacking the ALJ's Ruling on the applicability of a six-year statute of limitations, the Respondents asserted --

that anemic ruling offered . . . only his interpretation of the statutes and regulations, which he later affirms he is without authority to render (p. 48). Since the ALJ lacks authority to render a decision regarding these crucial jurisdictional issues, . . . the decision . . . must be vacated . . . .

Respondents' Br. at 2.

The ALJ did not state that he was without authority to decide jurisdictional issues. Rather, the ALJ indicated that while he was "without the authority to decide the validity of statutes or regulations," he did "have authority to . . . interpret laws, regulations, and court decisions." ALJ's Decision at 48. The ALJ's Ruling was merely his interpretation of the applicable law and was clearly within his authority.

36. For purposes of determining whether an action was initiated within the six-year statute of limitations, the term "presented" refers to the date on which a claim was received by an agent acting on behalf of the United States or a state.
37. All of the 271 claims at issue were presented within six years of the date of the notice letter.

38. For each of the 271 claims at issue, the I.G. initiated his action against the Respondents within the six-year statute of limitations.
ALJ's Decision at 4, 6.

Simply put, the issue is when the action against the Respondents was initiated within the meaning of section 1128A(c)(1). The Respondents asserted that this determination should be governed by Rule 3 of the Federal Rules of Civil Procedure, which provides: "A civil action is commenced by filing a complaint with the court." Applying Rule 3, the Respondents argued by analogy that this cause of action began on August 17, 1989 when this case was docketed (with the Board's Civil Remedies Division) and assigned to the ALJ. Respondents' Br. at 11. The Respondents maintained that the I.G.'s June 7, 1989 letter was merely a proposal to impose a penalty and did not serve the same purpose as actual service of a summons as required by Rule 4 of the Federal Rules. The Respondents asserted that if the statute was silent on the point, the absence of a standard and the desire for uniformity would make Rule 3 the test for commencement. Thus, the Respondents asserted that the I.G. should have filed a complaint against them (Rule 3), followed by a summons (Rule 4). The Respondents then contended that since they had never

received a summons, this case should be dismissed.13/ Id. at 13.

Upon consideration of the Respondents' arguments, we conclude that the ALJ correctly determined that this action was initiated on June 7, 1989. Thus, the claims here (since they were presented by the Respondents after June 7, 1983) are within the six-year statute of limitations (which we have found applicable).

There is no substance to the Respondents' contention that Rule 3 should apply to determine the start of the action. As the ALJ recognized, the Respondents' arguments on this issue in general completely ignore the plain language of section 1128A(c)(1) of the Act, which permits the Secretary to "initiate action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure." The ALJ noted that Rule 4 governs the service of documents and authorizes service by mail. He concluded, based on the context and legislative history of section 1128A(c)(1), that the action here was initiated on the date of mailing of the notice. ALJ's Decision at 28-30. The Respondents provided no persuasive reason why we should conclude that the ALJ erred in determining that Rule 3 is irrelevant to a CMPL proceeding. In fact, application of Rule 3 would not make sense since it is not the I.G. who requests a hearing before an ALJ. See 42 C.F.R. 1003.111.

13/ As part of this general argument, the Respondents also asserted that since the Eye Center was not excluded from Medicare or Medicaid in 1983, it could not be charged with a CMPL violation. The Respondents then alleged that the 1983 suspension of Dr. Petrus violated the Fifth Amendment. Respondents' Br. at 14. We address these arguments at Part I, section 5.B. of this analysis.

Further, the preamble to the CMPL regulations states:
The notice is the functional equivalent of a complaint and summons in a civil proceeding, which a defendant is required to answer to avoid entry of a default judgment against him. 48 Fed. Reg. 38827, 38833 (August 26, 1983); see I.G.'s Br. at 38. Thus, contrary to the Respondents' assertion, the I.G.'s June 7, 1989 letter did more than merely propose a penalty. The notice is a "proposal" only because the Respondents had a right to request a pre-sanction hearing. However, absent a request for a hearing, the penalty would become effective upon expiration of the 30-day period set out in the letter, similar to a default judgment. See 42 C.F.R. 1003.110.
Accordingly, we affirm and adopt FFCL Nos. 25, 34, and 36-38.

3. The ALJ's Rulings on the admissibility of evidence in this case did not violate Respondents' due process rights.

The Respondents argued that the ALJ violated their due process rights by admitting grand jury materials (which the I.G. had submitted after obtaining a court order releasing the materials for use in this CMPL proceeding).14/ The Respondents argued that release of the materials for use in an administrative hearing was not in accordance with the law and represented an abuse of discretion, and that all grand jury materials should be stricken from the record.

The ALJ rejected various challenges by the Respondents to use of the materials, holding that (1) there was nothing in the record to suggest that the I.G. had engaged in misconduct with respect to the grand jury process or acted improperly with

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14/ The Respondents also alleged, without supporting reasons, that the ALJ violated their due process rights by denying admission of the Respondents' evidence during the hearing. That ruling, however, was clearly within the ALJ's authority under section 1128A(c)(4) of the Act and was reasonably related to the Respondents' willful failure to comply with the ALJ's orders regarding submission of exhibits. See Hearing Transcript (Tr.) at 1230-1252.

respect to release of the materials, and (2) there was no basis to conclude that admitting the materials was unfair to the Respondents. The ALJ noted that the grand jury materials were either photocopies of records obtained from the Respondents originally or transcripts of testimony of witnesses who were available for cross-examination at the hearing and whose prior statements the Respondents had ample opportunity to review. ALJ's Decision at 31-32. We conclude that the ALJ did not err in admitting the grand jury materials.15/

On appeal, the Respondents raised three points. First, the Respondents argued it was unfair that certain grand jury materials released to the I.G. were withheld from the Respondents. The Respondents said that the I.G. had withheld materials favorable to them. In support of their position, the Respondents cited to testimony by an I.G. investigator, which the Respondents said showed that she had selected from the released materials only those favorable to the I.G. Respondents' Br. at 15, citing Tr. at 1309-10, 1319, 1406, 1509-10. An examination of the investigator's testimony as a whole, however, indicates that she was selective only so far as she selected from the documents before the grand jury only those related to the claims at issue in this proceeding. There is no basis in the cited testimony for concluding that she did not select relevant documents favorable to the Respondents. Her testimony is thus consistent with the I.G.'s assertion that the I.G. had furnished to the Respondents all of the material released pursuant to the court order. I.G.'s Br. at 19, 55. Therefore, we reject the Respondents' argument that released materials were unfairly withheld from the Respondents.

15/ The I.G. would have us apply an abuse of discretion standard to this issue and to other related questions. We do not here decide the appropriate standard for our review of an ALJ's evidentiary rulings since we would uphold the ALJ's rulings here under any standard.

The Respondents also argued that release of grand jury materials to the I.G. violated Rule 6(e) of the Federal Rules of Criminal Procedure and the due process clause of the Fifth Amendment. Although the Respondents cited numerous cases on the appropriate standard for release of grand jury materials to federal government attorneys, none of the cases specifically require an ALJ to examine independently whether a court has properly ordered release and to exclude such documents if improperly released.16/ The only sanction specified by Rule 6(e) for improper release is contempt of court for a knowing violation. Moreover, the cited cases stand primarily for the proposition that government attorneys seeking to use grand jury materials in a civil proceeding must obtain a court order under Rule 6(e)(3)(C)(i), based on a showing of a particularized need. See United States v. Sells Engineering, Inc., 463 U.S. 418 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Here, the I.G. (through an Assistant U.S. Attorney) did obtain a court order based on a showing the District Court found satisfactory. See Respondents' Motion to Suppress Grand Jury Materials (August 7, 1990), Exhibits (Exs.) A and B; see also ALJ's Ruling Denying Respondents' Motion to Suppress Grand Jury Materials (August 15, 1990).17/ While the Respondents

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16/ The Respondents did not cite to any rule of evidence as a basis for excluding grand jury materials, and, in any event, under the regulations governing CMPL proceedings, the technical rules of evidence do not apply "except that when reasonably necessary, the ALJ must apply rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination." 42 C.F.R. 1003.118(c).

17/ Under Sells, the exception in Rule 6(e)(3)(A)(i) allowing disclosure to government attorneys would not apply here, contrary to what the ALJ implied in his March 1, 1990 Order. The basis for the ALJ's ruling, however, was that Rule 6(e) was irrelevant and that the Respondents had not established that they would be prejudiced by admission of the material in question there. Thus, the ALJ's error in discussing Rule 6(e) was merely dicta and was

(continued...)

are correct that release for use in an administrative hearing under Rule 6(e)(3)(C)(i) is conditioned on that hearing being "preliminarily to or in connection with a judicial proceeding," none of the cited cases directly addresses the circumstances here. The district court could reasonably have determined that this proceeding met the basic test set out in those cases.

The Respondents' view that grand jury testimony may present a one-sided and incorrect picture since the witnesses are not subject to confrontation and cross-examination is supported by citation to United States v. Young, 494 F. Supp. 57, 64 (E.D. Tex. 1980). The court's point in Young, however, was that this lack of fairness in the grand jury process is a reason for protecting the grand jury process from abuse. As the ALJ found, there is no evidence of abuse of process by the I.G. here. Moreover, the witnesses whose testimony was released were all present at the ALJ hearing and subject to confrontation and cross-examination, so any possible unfairness to the Respondents in the grand jury process was remedied. Thus, we reject the Respondents' argument that use of the grand jury materials violated due process.

The Respondents also challenged use of the grand jury materials as contrary to agency policy, relying on a statement in a Health Care Financing Administration (HCFA)18/ Regional Office Manual on using grand jury materials as a basis for administrative action. See Respondents' Br. at 19, citing Regional Office Manual of HCFA, Part 2 Medicare,

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17/ (...continued)
harmless in any event, since the Respondents did not establish that release was improper under the standard set out in Sells for issuing a Rule 6(e)(3)(C)(i) order.

18/ HCFA is the component within the Department of Health and Human Services charged with administering the Medicare and Medicaid programs.

HCFA Publication 23-2, section 4290. This reliance is misplaced. Assuming the manual applies to the I.G. (which is not clear), the manual simply states a general policy intended to avoid any action which might "prejudice any subsequent criminal prosecution activity and violate Rule 6." The manual appears to recognize an exception where a separate, secondary investigation is impossible. In any event, the prosecution activity was completed here, and the I.G. took steps to comply with Rule 6 by obtaining a court order for release of the materials.

In sum, we conclude that the ALJ did not err in admitting the grand jury materials. We note, moreover, that even if the grand jury materials were stricken from the record, we would still uphold the penalty here. The grand jury materials were cited for findings on relatively few of the 271 counts at issue here and, for the most part, are simply cumulative of other evidence in the record supporting the findings.

4. The ALJ's denial of Respondents' motion to postpone the hearing was not unfair to the Respondents.

The issues raised by the Respondents here are whether the ALJ's refusal to postpone the hearing to accommodate Dr. Petrus' alleged poor health was unfair, and whether the ALJ was biased against the Respondents.

A. Dr. Petrus' physical condition

On March 14, 1990, the Respondents asked that the hearing before the ALJ, scheduled to start on March 19th, be postponed indefinitely, among other reasons, "to allow the Respondent time for his aggravated medical disability to subside." Accompanying the Respondents' Motion was a letter from a Dr. Ross who indicated that Dr. Petrus was suffering complications from a back injury. Dr. Ross requested that the hearing be postponed for at least two weeks. See Respondents' March 14, 1990 Motion.

On March 15, 1990, the ALJ denied the Respondents' Motion, without prejudice, ruling that there was not sufficient information available to him to assess the merits of the Motion. The ALJ directed Dr. Petrus to produce Dr. Ross, or the physician of his choice, at the start of the hearing to testify under oath and be cross-examined concerning Dr. Petrus' condition. Additionally, the ALJ directed Dr. Petrus to produce treatment records relevant to his condition at that time. The ALJ also gave the I.G. the option to have Dr. Petrus examined by a physician after notice to Dr. Petrus. The ALJ determined that the I.G.'s physician would also be subject to cross-examination. The ALJ notified Dr. Petrus that failure to comply with the guidelines established by his Ruling would result in the ALJ refusing to entertain a request to postpone the hearing. See ALJ's March 15, 1990 Ruling.

On the first day of the hearing (March 19th) the Respondents renewed their Motion, but did not produce Dr. Ross, or any physician, to testify. Instead, the Respondents asserted that Dr. Ross "could appear later." Tr. at 16. In anticipation of Dr. Ross' testimony, Dr. Petrus was examined by the I.G.'s physician, Dr. Turpin. At the start of the hearing's second day Dr. Petrus notified the ALJ that he would not produce Dr. Ross to testify. At that point, the ALJ denied the Respondents' Motion and ordered the hearing to continue. ALJ's Decision at 33.

The Respondents argued that they were prejudiced by the ALJ's "callous disregard" of Dr. Petrus' physical limitations. They contended that Dr. Petrus had "documented disabilities" which hindered his ability to function effectively during the hearing. The Respondents alleged that the ALJ placed "excessive demands on Dr. Petrus and criticized him throughout the hearing for not maintaining the same pace as the I.G. staff." The Respondents noted that Dr. Petrus appeared pro se and alleged that they were "always" overruled by the ALJ, while the ALJ "catered to" the I.G. The Respondents maintained that the ALJ acted unfairly in refusing to compel

the I.G. to provide them with a copy of Dr. Turpin's report on Dr. Petrus since, they alleged, that report recommended frequent rest for Dr. Petrus during the hearing. Respondents' Br. at 20-21.

There is no merit to the Respondents' argument that the ALJ abused Dr. Petrus' physical limitations. The ALJ established clear and reasonable guidelines under which he would consider the Respondents' Motion to Postpone. Rather than acting in a manner which would demonstrate to the ALJ that there was substance to the Motion, Dr. Petrus acted in a manner indicating just the opposite. The Respondents' contentions before this Panel are no more credible.

The Respondents claimed that their case was somehow damaged by their inability to obtain Dr. Turpin's report (which they nevertheless managed to cite as support for their position that the ALJ abused Dr. Petrus' physical limitations). This assertion is baseless. The Respondents made an unsupported Motion regarding Dr. Petrus' condition. The ALJ reasonably refused to issue a final ruling on the Motion absent relevant medical testimony. The sole purpose for Dr. Turpin's examination and report on Dr. Petrus' condition was to provide a basis for the I.G.'s response to an issue (Dr. Petrus' health) raised by the Respondents. The ALJ did not need to consider this issue further when it became clear that the Respondents would not attempt to substantiate the allegations serving as the basis of the Motion. Dr. Petrus' refusal to comply with the ALJ's guidelines resulted in dismissal of the Motion to Postpone before consideration of <u>any</u> medical opinion as to his condition was necessary. Thus, the ALJ reasonably denied the Respondents access to Dr. Turpin's medical report.

Moreover, Dr. Petrus' actions during the hearing further undercut the credibility of his arguments regarding his physical condition. Both before and again on the first day of the hearing, Dr. Petrus moved for a postponement based on his alleged physical impairments. However, at the close of that

first day's proceedings, Dr. Petrus informed the ALJ that he would "not be able to be here tomorrow morning." Tr. at 172. Dr. Petrus then informed the ALJ that he was scheduled to be in county court to answer interrogatories in a civil action. Id. at 172-177. On the second day of the hearing, when pressed by the ALJ to explain his actions, Dr. Petrus indicated that he had been aware of the impending court date for some two and one-half months, but had simply forgotten about it. Id. at 185-188.

We find no support for the Respondents' assertion that the ALJ conducted the hearing at a pace ill-suited for Dr. Petrus' condition. Dr. Petrus failed to substantiate his allegation of a medical disability so there is no basis for finding that his physical condition hindered his performance at the hearing. We find the ALJ's general description of the hearing schedule as not unduly taxing to be accurate. See ALJ's Decision at 33, n.5. Further, even assuming that the Respondents were correct that the ALJ "always" overruled them (which the transcript shows was not so), the mere overruling of a party does not constitute an abuse of medical disability, nor (as we discuss next) is it sufficient to support a claim of bias.

B. The Respondents' allegation of bias

The Respondents' allegation that the ALJ was biased also lacks merit. The law has long been well-settled that, in order to disqualify a judge, bias must stem from an extrajudicial source. The Supreme Court has held that:

The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case . . United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); see also Tynan v. United States, 376 F. 2d 761 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4th Cir. 1974).

In their exceptions, the Respondents simply stated that they had moved on two occasions for the ALJ to recuse himself from the hearing "due to his demeanor and obvious lack of objectivity." The Respondents asserted that their request "was supported by the comments made by the ALJ in notes passed between himself and his assistant." Respondents' Br. at 21. The Respondents never even contended that the ALJ was biased against them because of some extrajudicial source. In fact, the Respondents, except for the notes to be discussed, did not make specific reference to the circumstances in which their motions were made, or otherwise set out a particular basis for their claim.

In his decision, the ALJ did address the circumstances of the Respondents' motions for recusal. He noted that the motions were based on rulings concerning admission of evidence and motions that the ALJ postpone the hearing. ALJ's Decision at 32-34.19/

Neither ruling by the ALJ meets the requirement of an extrajudicial source for showing bias. See Ex parte American Steel Barrel Co. and Seaman, 230 U.S. 35 (1913); In Re International Business Machine Corp., 618 F.2d 923, 929 (2d Cir. 1980); see also Annotation, Disqualification of Federal Judge, 2 A.L.R. Fed. 917 at 927 (1969), noting: "It has been uniformly held or recognized in civil proceedings that adverse rulings made by the judge in the case or proceeding itself do not constitute a sufficient basis for his disqualification under the statute [pertaining to disqualifications of federal judges]."

However, the Respondents did, as part of their bias exceptions, submit certain notes generated during the hearing by the ALJ

19/ The first motion was made following the ALJ's refusal to grant the Respondents' motion for postponement on the grounds of medical hardship. Tr. at 755-756. The second motion occurred following the ALJ's ruling on the admission of certain evidence by the Respondents during the hearing. Tr. at 1238.

and his assistant. See Respondents' Ex. D (accompanying their exceptions). The ALJ elected to treat the Respondents' assertion of bias, in their exceptions, as a motion that he disqualify himself and rescind his decision. See ALJ's Ruling Denying Respondents' Motion That I Disqualify Myself (November 8, 1990). The notes in question were written by the ALJ and his assistant during the hearing. Dr. Petrus retrieved the notes from a wastebasket on the judge's dais and reconstructed them. Id. at 2.

In spite of the fact that Dr. Petrus retrieved the notes from the trash during the hearing, he did not use them as the basis for an objection during that proceeding (although the Respondents' exceptions imply otherwise). As the ALJ indicated, the Respondents first mentioned the notes in their exceptions. Even then, the Respondents held back some of the notes, choosing to submit them with a reply to the ALJ's November 8, 1990 Ruling.20/

It is hardly necessary to say that the writing of these notes, which in some ways are critical of Dr. Petrus, was unwise. But to find bias and to upset an extensive hearing on their basis is an entirely different matter. As was said of certain allegedly intemperate and derisive remarks directed at counsel by an ALJ in NLRB v. Honaker Mills, Division of Top Form Mills, Inc., 789 F.2d 262, 266 (4th Cir. 1986), the notes were "at least innocuous, and at most injudicious. They do not rise to the level necessary to support the serious charge of judicial bias . . ."

The most that can be said of these notes is that they expressed a sense of frustration by the ALJ with the progress of the hearing. In his decision the ALJ, referring to the Respondents' motions for recusal, repeats his basis for denying the motions. He stated that it was apparent to him at the hearing that many

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20/ The Respondents' reply was undated, but was received by the Civil Remedies Division on November 26, 1990.

of the Respondents' motions were frivolous and dilatory. He noted that the Respondents' tactics included repetitive filing of essentially the same motions. However, he asserted that his opinions as to Dr. Petrus' conduct of the case or his demeanor at the hearing had no bearing on his assessment of the evidence or his decision as to the remedy. See ALJ's Decision at 34, n.6.

A reading of the record suggests that Dr. Petrus' actions before and during the hearing may have contributed to the ALJ's sense of frustration. Regardless, it is clear that the note-writing episodes were not the result of anything outside the hearing which could possibly support a finding that the ALJ was biased against the Respondents. Nothing in the notes can reasonably be said to show that any extrajudicial source, something outside of the proceeding itself, was having the effect on the ALJ of biasing him against the Respondents. Nowhere in the exceptions is there even any implication of an allegation by the Respondents that an extrajudicial source caused the ALJ to be biased against them.

In the regulatory provisions pertaining to the authority of the ALJ, the only reference to an ALJ's conduct provides that the ALJ "will conduct a fair hearing." 42 C.F.R. 1003.115(a). The Respondents' allegations do not show that the hearing was unfair in any way. Rather, a careful examination of the hearing transcript, as well as the entire record before the ALJ, shows that the ALJ was fully cognizant of Dr. Petrus' pro se status and made every effort to ensure that the Respondents received a full and fair opportunity to present their case.

Moreover, the ALJ made several major rulings which went in the Respondents' favor. The penalties and assessments imposed by the ALJ ($180,000) were far less than the amount ($374,310) originally sought by the I.G. The ALJ issued a ruling denying the I.G.'s request to this Board's Civil Remedies Division for data relative to the costs incurred in bringing this case to a hearing and an estimate of costs incurred in

rendering an initial decision. See ALJ's Ruling (June 21, 1990). Additionally, the ALJ refused to allow the I.G. to supplement the record with specific information regarding the I.G.'s costs in prosecuting this case. ALJ's Decision at 45, n.15. The ALJ also dismissed the I.G.'s exceptions as untimely filed. These rulings undercut the Respondents' allegation of bias.

There is nothing in the record of this case which can reasonably be found to support the Respondents' allegation that the ALJ was biased against them.

5. Respondents presented or caused to be presented claims for items or services in violation of section 1128A of the Act.

The two principal FFCLs at issue here are--

29. Respondent Eye Center presented all 271 of the claims at issue.

30. Respondent Petrus caused all 271 of the claims at issue to be presented.

ALJ's Decision at 5.

This case involved Medicare and/or Medicaid claims for services provided between May 12, 1983 and January 21, 1984. The ALJ determined that the claims sought reimbursement for 271 items or services (counts) provided by Dr. Petrus or at his direction during a period when he was suspended from Medicare or Medicaid. The ALJ also found that 174 of the 271 counts falsely represented the name of the physician who provided or directed provision of the items or services claimed. ALJ's Decision at 34. The substance of the ALJ's analysis on this issue is set out below.

The ALJ found that the Respondents' actions relative to the 271 counts were aimed at circumventing the effects of Dr. Petrus' suspension. As part of the Respondents' scheme, the

ALJ found, Dr. Petrus employed two ophthalmologists (Drs. Malsky and Baer) between June 1983 and January 1984 but did not inform either doctor that he was suspended from Medicare and Medicaid. Upon gaining access to Dr. Malsky's Medicare/Medicaid provider number, the Eye Center resubmitted previously rejected claims for services Dr. Petrus had provided while suspended but prior to Dr. Malsky's employment. The resubmitted claims identified Dr. Malsky as the provider of the service. Dr. Petrus instructed his employees to submit claims for services which he provided, identifying either Dr. Malsky or Dr. Baer as the provider. Id. at 35-36.

The ALJ rejected the Respondents' contentions that the "false claims" were the result of negligence or clerical errors by the Eye Center staff. Rather, the ALJ found that the evidence overwhelmingly supported a finding that these claims were submitted as part of the Respondents' scheme to defraud Medicare and Medicaid. Additionally, the ALJ found that Dr. Petrus' 1985 guilty plea constituted an admission to the I.G.'s charges that the Respondents defrauded Medicare and Medicaid. Id. at 37-38.

In addressing specific aspects of the Act, the ALJ found that section 1128A(a)(1)(D) makes it unlawful for a party to present or cause to be presented claims for items or services furnished during a period when a person is excluded from participation in Medicare or Medicaid.21/ The ALJ interpreted this section to embody a standard of strict liability regarding violations. The ALJ found the evidence supported a

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21/ Prior to 1987 the earlier version of this law, at section 1128A(a)(1)(B), proscribed presenting or causing to be presented a claim for items or services, "payment for which may not be made under the program under which such claim was made . . . ." The 1987 amendment did not change the intent or scope of the law, except to include within the proscription claims by beneficiaries or recipients made at the direction of an excluded party. See H.R. Rep. No. 85, 100th Cong., 1st Sess., pt. 2, 14-15 (1987).

determination that Dr. Petrus, by directing the Eye Center to present these claims, caused the claims to be presented. Id. at 39-40.

The ALJ noted that section 1128A(a)(1)(A) makes it unlawful for a party to present or cause to be presented claims for items or services where a party knows or should know that the items or services were not provided as claimed.22/ Under the "knows" standard of liability the ALJ indicated that it was not necessary for Dr. Petrus to personally submit a false claim. Addressing the 174 claims which falsely represented that either Dr. Malsky or Dr. Baer provided items or services for which reimbursement was claimed, the ALJ found that Dr. Petrus instructed the Eye Center staff to attribute items or services to the other doctors in circumstances where he knew that those physicians could not have provided them. The ALJ noted that the Eye Center was as culpable as Dr. Petrus in that the Eye Center was entirely owned and directed by him. Id. at 40-41.

The ALJ indicated that the "reason to know" standard contained in the Act prior to December 22, 1987 imposed a duty on a provider to prevent submission of false claims where: (1) the provider had sufficient information to place him on notice that the claims were for items or services not provided as claimed, or (2) there were pre-existing duties requiring a provider to verify the truth, accuracy and completeness of

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22/ The ALJ recognized that, prior to December 22, 1987, this section's standard of liability for a party who filed a false claim was whether the party knew or had reason to know the item or service was not provided as claimed. On December 22, 1987, Congress retroactively substituted the "should know" standard for the "reason to know" standard. The ALJ noted that the validity of Congress' retroactive application of the "should know" standard to claims for items or services presented prior to December 22, 1987 had not been tested in Court. Consequently he applied the "knows" and "should know" standards of the 1987 revision, as well as the pre-revision "has reason to know" standard, in deciding the Respondents' liability under section 1128A(a)(l)(A). See ALJ's Decision at 40, n.13.

claims. The ALJ found that Respondents knew that Dr. Petrus' instructions to the Eye Center staff would inevitably lead to the presentation of false claims. Thus, the ALJ concluded, the Respondents had information placing them, as medical providers, on notice that 174 items or services were not provided as claimed. Id. at 42.

The ALJ identified "should know" as the broadest standard of liability under the Act. The ALJ determined that this standard subsumed a reckless disregard for the consequences of a person's acts. It includes situations where a respondent has reason to know that the items or services were not provided as claimed, as well as negligence in preparing and submitting claims or directing their preparation and submission. The ALJ determined that since the Respondents had reason to know the claims were false, they also should have known they were false. Finally, the ALJ concluded that even if the evidence were viewed in a light most favorable to the Respondents, their "cavalier indifference to the truthfulness of their claims" exceeded ordinary negligence. Id.

The Respondents offered a wide variety of arguments to show that the ALJ's findings on this issue were in error. Generally, the Respondents asserted: (A) that the items or services in issue were provided as claimed; (B) that the Eye Center was not suspended (this argument was further delineated into several sub-arguments where the Respondents attacked Dr. Petrus' 1983 suspension, alleged that his 1984 indictment was vindictive, and maintained that there had been no violation of the Medicare/Medicaid Fraud Statutes), and that all the claims which it submitted were thus eligible for federal reimbursement; and (C) that the I.G. failed to prove liability under the CMPL.

A. Respondents' assertion that claims for items or services were provided as claimed

The focus of this aspect of the Respondents' argument was on the fact that the services for which Medicare and/or Medicaid reimbursement was sought were actually provided to the patients. The Respondents noted the I.G.'s concession, before the ALJ, that there was no evidence suggesting that the Respondents billed for services not in fact provided. The Respondents argued that, absent a statutory or regulatory definition of the term, "not provided" must be given its ordinary meaning, i.e., not furnished or supplied. The Respondents asserted that misrepresentations have significance in reference to CMPL violations only when the item or service was not provided. Thus, the Respondents sought to distinguish their situation from earlier cases relied upon by the ALJ involving situations where less expensive items or services were provided while reimbursement claims for costlier items or services were submitted.23/ Respondents' Br. at 22-24.

We first note that, even if the Respondents' analysis were correct (which it is not), it would not provide a basis for reversing the ALJ's Decision. That decision found the Respondents liable both under section 1128A(a)(1)(D) and, with respect to some of the counts, under section 1128A(a)(1)(A). The Respondents' arguments pertain only to the language of the latter section. Those arguments lack merit for the following reasons.

The I.G. proved by a preponderance of the evidence that the claims falsely stated which physician provided the services in order to obtain payment for services in fact provided by an

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23/ Thuong Vo, M.D. and Nga Thieu Du, DAB Civ. Rem. C-45 (1989); Anesthesiologists Affiliated, et al. and James E. Sykes, D.O., et al., DAB Civ. Rem. C-99 and C-100 (1990), DAB App. Rev. denied, (1990); Tommy G. Frazier and Praeter Drugs, Inc., DAB Civ. Rem. C-127 (1990), DAB App. Rev. denied, (1990).

individual suspended from Medicare and Medicaid participation. Dr. Petrus' suspension precluded any payment for services furnished by him. See section 1862(e) of the Act; 42 C.F.R. Part 420, subparts A and B (1982); 42 C.F.R. 455.212(d)(1) (1982). Thus, by misrepresenting who had provided the services, the Respondents were misrepresenting a fact material to determining the validity of the claims.

If a service is not, in fact, provided by the physician identified on the claim form as the provider of the service, then the service is "not provided as claimed" within the plain meaning of section 1128A(a)(1)(A). The Respondents' arguments focus solely on the wording "not provided" and ignore the qualifying language "as claimed." The Respondents' reading makes no sense in the context of the Medicare and Medicaid programs, which authorize payment only for particular services meeting specified requirements, including that the provider of services is an eligible provider and is not suspended from participating in the programs. Since identification of the provider is integral to a claim, the ALJ correctly concluded that the 174 items or services which misidentified the provider were "not provided as claimed."

B. Respondents' assertion that the Eye Center of Austin was never suspended

The Respondents asserted that since the Eye Center was never suspended, any claims submitted by it during the period of suspension were valid. The Respondents sought to support this argument by attacking Dr. Petrus' 1983 suspension from Medicare and Medicaid on double jeopardy grounds, by arguing that Dr. Petrus' 1984 indictment for Medicare and Medicaid fraud was vindictive, and by alleging that there were, in fact, no violations of the Medicare/Medicaid Fraud Statutes. Respondents' Br. at 24-31. As explained more fully below, these arguments are largely irrelevant and, in some instances, completely outside the scope of our review authority.

Dr. Petrus stipulated that, for the period in issue here, he was the sole owner and operator of the Eye Center and the sole member of the professional association known as the Eye Center. Tr. at 453. The June 10, 1982 notice of suspension notified Dr. Petrus that no federal payment would be made for any item or service provided by him directly or as an employee of a provider. I.G. Ex. 100 at 2. The Medicare statute and the Medicare and Medicaid regulations in effect at that time also gave notice that the effect of a suspension was that no payment would be made for services furnished by Dr. Petrus. Section 1862(e) of the Act; 42 C.F.R. 420.112(b), 455.212(d) (1982); 42 C.F.R. 420.2 (1982) (definition of "furnished" as meaning provided directly by or under the direct supervision of); 42 C.F.R. 420.126, 455.213 (1983). Thus, it is irrelevant that the Eye Center was not named in the suspension notice as payment for services furnished by Dr. Petrus was barred, irrespective of whether the claims were presented by him or by the Eye Center.

We also conclude that the ALJ did not err in ruling that Dr. Petrus could not properly challenge his 1983 suspension as part of this proceeding. Dr. Petrus challenged that suspension before the ALJ. Rejecting Dr. Petrus' arguments, the ALJ noted that section 1128 of the Act contained "specific procedures for appealing a suspension and Respondents' only potential route of administrative relief from the 1983 suspension would have been pursuant to those procedures." See Ruling on Respondents' Motions (February 6, 1990). Moreover, it is worthwhile to note that the agreement implementing that suspension was negotiated, in part, by counsel for Dr. Petrus and was intended as a "full . . . and final settlement of all . . . causes of action . . ." emanating from those facts on which the suspension was based. See I.G. Ex. 102 at 9.

The Respondents' assertion that Dr. Petrus' 1984 indictment on federal Medicare/Medicaid fraud and obstruction of justice charges was vindictive, baseless, and constituted a violation of

due process is based on allegations about the I.G.'s investigators' activities which are unsupported by the cited testimony, when that testimony is considered in context, or which are insufficient to call the indictment into question. See Respondents' Br. at 28-30. Even if the 1984 indictment was flawed as the Respondents alleged, however, that would make no difference here since there is independent evidence in the record to support the ALJ's findings on all 271 claims at issue and on the activities underlying the obstruction of justice charge. See ALJ's Decision at 40, n.12; FFCLs No. 181-193.24/

C. Respondents' assertion that the I.G. failed to prove liability under the CMPL

The Respondents argued that the I.G. failed to demonstrate that the Respondents knew that an employee of the Eye Center was submitting claims for services with the wrong provider number. The Respondents maintained that the Act expressly limited Dr. Petrus' liability, as the principal, to those instances where he could be found to have known or to have had reason to know that the claims were improper. They contended that the CMPL precludes application of the doctrine

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24/ The ALJ's Ruling of February 6, 1990 (entering partial summary disposition against Respondent Petrus with respect to the six claims covered by the two criminal counts) was based on 42 C.F.R. 1003.114(c). That section makes binding in a CMPL proceeding a final determination that a respondent presented or caused to be presented a claim or request within the scope of section 1003.102. Section 1128A(c)(3) of the Act, as amended by Public Law 99-509, section 9317, also contains a provision estopping a person who has been convicted (including upon a guilty plea) of a federal crime charging fraud or false statement and involving the same transaction from denying the essential elements of the criminal offense in a CMPL proceeding. This section was effective October 21, 1986, without regard to when the conviction was obtained (except for conviction on a plea of nolo contendere).

of vicarious liability but, rather, required proof of malfeasance or misfeasance by Dr. Petrus. Respondents' Br. at 32.

The Respondents asserted that the claims in question were submitted, or resubmitted with a new provider number after having been rejected for payment under Dr. Petrus' provider number, without Dr. Petrus' knowledge and, therefore, liability could not be imposed against him. Rather, the Respondents contended, it was Dr. Malsky and Dr. Baer who had "reason to know" if any claims for services were not provided as claimed. The Respondents also alleged that the I.G.'s investigator knew that Dr. Petrus had not been informed of his suspension until June 1983 and consequently tailored her investigation to portray him in the worst possible light to enhance his criminal prosecution. In support of their assertions, the Respondents listed alleged facts which, they said, were established by the hearing testimony. Id. at 32-33.

We first note that, even if the I.G. had failed to prove that the Respondents "knew" that claims with the wrong provider number were being submitted, we would not reverse the ALJ's Decision. That decision was also based on two alternative grounds: (1) that the Respondents were liable under section 1128A(a)(1)(D) of the Act (under a standard of strict liability, not requiring knowledge); and (2) that the Respondents were liable under section 1128A(a)(1)(A) under both the "reason to know" and "should know" standards.

In any event, we reject the Respondents' argument that the I.G. failed to prove by a preponderance of the evidence that the Respondents knew that 174 of the claims were submitted with the wrong provider number. The ALJ, in determining that the I.G. had met its burden of proof to show that the Respondents knew, carefully considered the evidence presented by the I.G. and found it to be credible and uncontradicted. ALJ's Decision at 40-41. The Respondents did not provide any specific citation to the hearing transcript in support of their various allegations on this issue. Moreover, most of these

allegations are simply irrelevant to the issue or treat as "facts" assertions specifically rejected by the ALJ.

For example, the Respondents alleged that they were not notified of the effective date of Dr. Petrus' suspension until June 1983. See Respondents' Br. at 32. The Respondents have presented this argument, generally without supporting evidence, since the onset of this case before the ALJ.25/ See Respondents' Motion to Dismiss for Lack of Jurisdiction (November 1, 1989) at 9; Respondents' Motion for Declaratory Order (November 1, 1989) at 6. However, Dr. Petrus' knowledge of the effective date of the suspension is irrelevant to the finding that he knew 174 claims were submitted with the wrong provider number. Moreover, the ALJ found only that "Respondent Petrus knew that the suspension became effective May 12, 1983." FFCL No. 196. This finding was based on the May 31, 1983 Order of Dismissal by the ALJ who had been assigned to the suspension hearing and on a March 29, 1983 letter from Dr. Petrus' lawyer after he had reviewed the ALJ's proposed order, without objection. I.G. Ex. 105 at 1, 4. It can reasonably be inferred from these documents that Dr. Petrus knew the effective date at least by June 8, 1983, the earliest date on which any of the claims at issue was presented. In any event, the Respondents did not cite to any authority which requires the I.G. to have established exactly when Dr. Petrus became aware of the effective date of his suspension in order to prove liability under either section 1128A(a)(1)(A), or section 1128A(a)(1)(D) of the Act. ccordingly, we reject the Respondents' argument that the I.G. failed to prove liability.

25/ Ultimately, the Respondents did attempt to offer "evidence" to support this argument. See Respondents' Br. at 42, containing citation to Tr. at 826-827 and Respondents' Exs. 11, 13, 17, and 18. This "evidence" does not support their position. The reference to the hearing shows only when an Eye Center employee learned of the suspension. Further, the "exhibits" cited by the Respondents were excluded from evidence by the ALJ, based on Dr. Petrus' willful refusal to comply with the ALJ's prehearing orders concerning submission of exhibits. Tr. at 1230-1252.

6. The assessments and penalties imposed in this case do not violate due process.

The Act and implementing regulations provide that a penalty of up to $2,000 for each item or service presented in violation of the Act and an assessment of not more than twice the amount claimed may be imposed on a respondent. See section 1128A(a) of the Act; 42 C.F.R. 1003.103 and 1003.104. Thus, based upon 271 claims for $40,000, the Respondents faced maximum penalties of $542,000 and assessments of $80,000.

The ALJ imposed $100,000 in penalties and $80,000 in assessments, to which the Respondents took exception.26/ Generally, the Respondents asserted that no remedial purpose was served by the penalties and assessments imposed against them. They contended that there was no financial loss to the government since the patients received the services for which payment was made, that there were no costs of investigation proven by the I.G., and that any question of deterrence is academic since they have been suspended for 25 years. Respondents' Br. at 33.

The Respondents then broke down their general arguments into several sub-arguments which we address below in the order in which they were presented.

A. Respondents' assertion that the I.G. has a "bounty system" which violates due process

The question of whether the I.G. employed an alleged bounty system and thereby violated the Respondents' due process rights was first raised before the ALJ in a Motion by the Respondents dated October 3, 1990. The ALJ considered and

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26/ The I.G. also took exception to the amount of penalties the ALJ imposed, arguing that it was too low. See I.G.'s Br. at 90-116. The ALJ rejected the I.G. exceptions as untimely filed and we affirmed that action.

rejected the Respondents' arguments. See Ruling Denying Respondents' Motion to Dismiss for Due Process Violation (October 9, 1990) (hereafter ALJ's Ruling (October 9, 1990)) at 1-2. Respondents' current argument is a reiteration of that Motion.

The Respondents' position was based on Melashenko v. Bowen, No. CV-F-87-533 (E.D. Cal. June 19, 1990). There the court found that, since one of the decision-makers in Melashenko's pre-exclusion hearing before the I.G. had a pecuniary interest in the matter (he was eligible to receive merit pay bonuses based on the number of sanctions he imposed), Melashenko's due process rights had been violated. This allegation was addressed by the ALJ, who distinguished Malashenko based on the facts and on differences between the exclusion process at issue there and the CMPL process here. The ALJ noted that in a CMPL case where a hearing is requested, the administrative law judge is the decisionmaker and that an administrative law judge is not compensated pursuant to a merit pay system and does not receive additional pay based on performance. ALJ's Ruling (October 9, 1990) at 2-3. The Respondents did not point to an error in the ALJ's analysis.

Additionally, the Respondents argued that the Secretary's delegation of authority to the I.G. to investigate and prosecute a case was an unlawful delegation of program operating authority. The ALJ noted that the Respondents' argument was identical to that presented and rejected in Anesthesiologists, supra. The ALJ recognized that the Respondents were asking him to adjudicate the lawfulness of the Secretary's delegation of authority to the I.G. As the ALJ correctly noted, such adjudication would directly contravene the proscription at 42 C.F.R. 1003.115(c) against administrative law judges deciding on the validity of federal regulations. ALJ's Ruling (October 9, 1990) at 1-2.

The Respondents did not present any argument which would cause us to reconsider the ALJ's Ruling. Accordingly, we reject the Respondents' argument on this point and, in doing so, affirm the ALJ's Ruling on this issue.

B. Respondents' assertion that since no damages were established by the I.G., the assessment against them was inappropriate

The Respondents asserted here, and before the ALJ, that no damages were established by the I.G. and, therefore, the assessment against them was inappropriate.

The statutory maximum for an assessment is "in lieu of damages." Section 1128A(a) of the Act. As the preamble to the CMPL regulations published in 1983 stated, Congress clearly intended to obviate the need for the Government to prove the amount of damages in order to make an assessment. 48 Fed. Reg. 38830 (August 26, 1983). The Secretary, however, has the discretion to consider the amount of actual damages, where they can be readily calculated, in arriving at a proper assessment. Id.

The ALJ found that the Respondents unlawfully claimed more than $40,000 from Medicare and Medicaid. While noting that the I.G. did not prove the exact amounts actually paid as the result of these claims, the ALJ found that the Respondents nevertheless obtained substantial reimbursement to which they were not entitled. The ALJ considered the most egregious aspect of the Respondents' actions to be the "utter contempt" which they evidenced for the integrity of the Medicare and Medicaid programs. ALJ's Decision at 44-45.

The Respondents' position that there were no damages to the Medicare or Medicaid programs is based on the erroneous assumption that, since services were actually provided, neither program was harmed. This ignores the fact, however, that neither Medicare nor Medicaid had an obligation to pay for

services provided by Dr. Petrus while he was suspended. Moreover, we agree with the ALJ that the Respondents' misconduct caused "inchoate" damage to the programs. The Respondents schemed to neutralize mechanisms established to protect program integrity and manifested utter contempt for these mechanisms and for the individuals charged with administering and enforcing them.

Accordingly, we sustain the assessments of $80,000, jointly and severally, against the Respondents.

C. Respondents' assertion that the penalties imposed against them were improper

The Respondents argued that since Dr. Petrus had already been punished for any alleged violation, the additional penalty imposed by the ALJ violated the Double Jeopardy Clause of the Fifth Amendment.27/ The Respondents also contended that the Eye Center was a corporation with a separate identity and that none of the disputed claims were submitted in Dr. Petrus' name. Thus, they reasoned, since the I.G. never presented or proved an "alter ego" basis for liability, the ALJ incorrectly imposed joint and several liability against them. Additionally, the Respondents attacked the ALJ's Order (February 6, 1990) granting partial summary judgment against Dr. Petrus with regard to six claims for items or services. The Order was based on Dr. Petrus' 1985 guilty plea to Medicare and Medicaid fraud charges and the doctrine of collateral estoppel. The Respondents argued that the ALJ's Order was erroneous since only Dr. Petrus pled guilty to those charges and this action involved both Dr. Petrus and the Eye Center. Respondents' Br. at 35-36.

27/ The Respondents also raised the question of double jeopardy as a distinct argument within their brief. Thus, we consider that issue separately in Part I, section 7 of our analysis below.

There is no merit to the Respondents' assertion that joint and several liability was improper. The Respondents' argument completely ignores the fact that the Respondents had stipulated that Dr. Petrus was the sole owner and operator of the Eye Center during the period covered by the claims at issue. Tr. at 453. Thus, there was no need for the I.G. to assert or prove an alter ego basis for liability. Moreover, even if the Eye Center was not an alter ego of Dr. Petrus, the ALJ found, and the Respondents did not specifically deny, that Dr. Petrus "caused" the claims to be presented within the meaning of section 1128A(a).

The Respondents' attack on the ALJ's decision to grant partial summary judgment based on collateral estoppel is equally unconvincing. The doctrine of collateral estoppel provides that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153 (1979). The Court noted that, precluding "parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the . . . vexation attending multiple lawsuits, . . . and fosters reliance on judicial action . . . ." The Court found that these interests were similarly implicated when nonparties assume control over litigation in which they have a direct financial interest and then seek to relitigate issues previously resolved. Id. at 153-154.

Thus, contrary to the Respondents' assertion, collateral estoppel does not necessarily require a prior judgment between the same parties. Rather, the critical focus is on the identity of the issues involved. See Ashe v. Swenson, 397 U.S. 436 (1970). Moreover, the regulation relied on by the ALJ in his Order directly addresses these circumstances. Specifically, 42 C.F.R. 1003.114(c) provides:

Where a final determination that the respondent presented or caused to be presented a claim or request falling within the

scope of [42 C.F.R.] 1003.102 has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent shall be bound by such determination in any proceeding under this part.28/

Obviously, Dr. Petrus was a party to both proceedings. In fact, on the basis of his stipulation, it would be fair to say that there is no practical difference between Dr. Petrus and the Eye Center for purposes of this proceeding. In light of the applicable statutory, regulatory, and case law, we conclude that the ALJ did not err in his February 6, 1990 Order entering partial summary disposition against Dr. Petrus. Moreover, even if we reversed that Order, we would not reverse the ALJ's Decision since it contains independent findings on the six counts covered by the Order.

In sum, the Respondents' arguments do not persuade us that the ALJ's imposition of joint and several liability against them was wrong. We note that the $100,000 penalties imposed against the Respondents represented a reduction of $193,500 from the amount originally sought by the I.G. In arriving at a final figure, the I.G. noted the Respondents' contempt for the Medicare and Medicaid programs. The ALJ concluded that Dr. Petrus' actions during the hearing and the content of the Respondents' post-hearing brief evidenced that the Respondents' contempt remained unabated.

However, while recognizing that the Respondents' conduct would, in his opinion, justify imposition of the maximum available penalties, the ALJ also considered the Act's remedial purpose. The ALJ noted that Dr. Petrus had been sentenced to prison based on his criminal fraud conviction related to certain claims at issue in this case. Additionally, Dr. Petrus was suspended from participation in Medicare and Medicaid

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28/ See note 24 above.

for 25 years. In view of these facts, the ALJ determined that penalties totalling $100,000 were reasonable.

Accordingly, we reject the Respondents' arguments and affirm imposition of $100,000 in penalties jointly and severally against the Respondents.

7. The CMPL action against Dr. Petrus does not violate the Double Jeopardy Clause of the Fifth Amendment.

The Respondents asserted that application of this civil penalty (which they characterize as punitive), after a criminal conviction based upon the same conduct, violates the Double Jeopardy Clause of the Fifth Amendment under the Supreme Court's holding in Halper, supra. In support of this position, the Respondents argued that Dr. Petrus' 1985 plea agreement covered all claims upon which the I.G. relied in this case, and thus precluded this CMPL action. The Respondents also reiterated their claim that the Medicare and Medicaid programs suffered no damages since the services were provided as claimed. See Respondents' Br. at 36-41. As explained below, we conclude that the ALJ properly rejected the Respondents' reliance on Halper in this case.

Halper was convicted in federal court of submitting 65 false Medicare claims resulting in an overclaim of $585. Halper was sentenced to two years in prison and fined $5,000. Relying on the same facts, the Government then obtained judgment against Halper in district court under the civil False Claims Act, 31 U.S.C. 3729 et seq. While noting that the False Claims Act provided a civil remedy, the district court found that a potential recovery of more than $130,000 ($2,000 liability x 65 claims) bore no rational relation to the Government's actual loss and costs. The court found that, as applied to Halper, the penalty provision of the False Claims Act violated the constitutional protection against double jeopardy. Halper at 437-440.

On review, the Supreme Court indicated that the determination whether a civil sanction constitutes punishment requires a particularized assessment of the penalty imposed and the purpose which that penalty could fairly be said to serve. The Court announced "a rule for the rare case" where a fixed-penalty provision subjected a "small-gauge offender" to a sanction overwhelmingly disproportionate to the damages sustained. Specifically, the Court ruled that the Government could not impose a criminal penalty against a defendant, then bring a separate civil action based on the same conduct and receive a judgment not rationally related to the goal of making the government whole. Id. at 447-451. However, the Court did acknowledge that "even remedial sanctions carry the sting of punishment." Id. at 447, n.7.

In Halper, the Court recognized the Government's entitlement "to rough remedial justice . . . according to somewhat imprecise formulas . . . without being deemed to have imposed a second punishment for purposes of a double jeopardy analysis." Id. at 446. Moreover, the Court clearly supported the Government's need to combat fraud when it stated:

Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, Double Jeopardy simply is not implicated.

Id. at 450.

As the ALJ noted in distinguishing Halper, Dr. Petrus was the only one of the two Respondents subject to a prior criminal action. Additionally, the conviction which applied to Dr. Petrus involved only six of the 271 items or services at issue here. Thus, contrary to the Respondents' position, before both the ALJ and this Panel, there was no prior adjudication and jeopardy concerning anything other than those six items or services (and the related obstruction of justice charge).

Further, in regard to the six claims to which Dr. Petrus pled guilty, the ALJ demonstrated a reasonable relationship between the amount involved there ($1,425) and the proportionate share of penalties and assessments attributable to those claims. ALJ's Decision at 50. Additionally, we note that the penalties and assessments imposed by the ALJ totalled less than one-half the amount originally sought by the I.G.

Accordingly, we reject the Respondents' assertion that the penalties imposed against them were improper.

II. The Respondents' Itemized Exceptions to the FFCLs

Below, we address the Respondents' enumerated exceptions to the ALJ's Findings of Fact and Conclusions of Law.

As we indicated above, the Respondents took specific exception to a majority of the FFCLs with the caveat that "the decision not to address all of the findings does not signify that the . . . [Respondents] accept them, but their inaccuracy is addressed in other documents." Respondents' Br. at 41.

The regulation addressing administrative review of an ALJ's decision specifically provides:

The initial decision of the ALJ becomes final and binding on the parties within 30 days after notice thereof is received by the respondent, unless on or before that 30th day a party files with the ALJ written exception to the initial decision and supporting reasons for the exceptions.

42 C.F.R. 1003.125(d).

This regulation clearly places the onus on the parties to identify timely any exceptions they wish to take relative to an ALJ's decision. See ALJ's Decision Dismissing Inspector General's Proposed Exceptions to Administrative Law Judge's

Decision (December 12, 1990) (I.G.'s exceptions dismissed as untimely filed).

Consequently, we do not view the Respondents' catch-all language as constituting an "exception" to each and every FFCL. Where the Respondents identified specific exceptions to FFCLs or any other final determination by the ALJ, we will, to the extent we have not already, address them. However, absent some reasonable indication that the Respondents are taking a specific exception, we will not otherwise engage in the abstract exercise of attempting to guess and address the Respondents' unstated positions.

Thus, any FFCL not specifically addressed in this decision is sustained by virtue of the Respondents' failure to take specific exception to it and to provide supporting reasons.

Below, we discuss the specific exceptions raised by the Respondents. Where the Respondents challenged a group of related FFCLs, we have paraphrased and shortened them, solely for ease of discussion, and indicate this by brackets. Our analysis here focuses on the arguments made by the Respondents on appeal and our reasons for rejecting those arguments. In affirming and adopting the FFCLs, however, we are concluding that they are based on substantial evidence in the record and that the ALJ reasonably determined that, where necessary, the I.G. proved the material facts by a preponderance of the evidence.

FFCL No. 30. Respondent Petrus caused all 271 of the claims at issue to be presented. ALJ's Decision at 5.

Generally, the Respondents asserted that Dr. Petrus "did not know, had no reason to know, or should have known that the claims for items or services were not . . . provided as claimed or for which payment could not be made." Respondents' Br. at 42. We have addressed this exception in Part I, section 5 of our

analysis. Based on that analysis we affirm and adopt FFCL No. 30.

FFCL No. 35. The I.G. may initiate an action under section 1128A of the Social Security Act within six years of the date that a claim at issue was presented. ALJ's Decision at 6.

The Respondents asserted that the I.G. was limited to a five-year statute of limitations. Respondents' Br. at 43. We considered this issue in Part I, section 1 of our analysis. Based on that analysis, we affirm and adopt FFCL No. 35.

FFCL No. 44. Dr. Malsky routinely made treatment notes of the patients he treated. ALJ's Decision at 7.

The Respondents asserted that, based on the testimony of two witnesses that Dr. Malsky frequently left medical charts incomplete, the ALJ could not credibly arrive at this finding. Respondent's Br. at 43. While the Respondents referred to the testimony of two witnesses in support of their position, their brief cited only to the testimony of one witness. The ALJ addressed this testimony and noted that the witness, while stating that Dr. Malsky sometimes failed to complete patient charts, could not state the frequency of this occurrence. ALJ's Decision at 39, n.10. Moreover, the excerpted testimony on which the Respondents relied is directed as much at Dr. Malsky's handling of "superbills" as treatment records. As the ALJ noted, these are two different documents. The ALJ specified that his finding was based on Dr. Malsky's testimony concerning treatment records, not the superbills. Id.

Thus, the question here goes to the probative value of the testimony. The role of the ALJ is to weigh sometimes conflicting testimony and to reach a decision rationally supported by the evidence. Here, the ALJ found Dr. Malsky's testimony and the physical evidence related to his performance to be credible and unrefuted by the testimony of the Eye Center employee, and we defer to that finding since the ALJ

had the opportunity to observe the witnesses. Accordingly, we affirm and adopt FFCL No. 44.

FFCL No. 51. Dr. Baer always recorded the procedures he performed at Respondent Eye Center. ALJ's Decision at 7.

The Respondents asserted that this finding was too broad. However, they pointed to no evidence in the record which refutes the finding. The excerpts from the hearing transcript upon which they relied are either taken out of context or of no value in attacking the credibility of Dr. Baer's testimony as relied on by the ALJ. See Respondents' Br. at 43-44. Accordingly, we affirm and adopt FFCL No. 51.

FFCL No. 54-156. [The essence of these FFCLs is captured in FFCL No. 156 which provides: "All 271 claims at issue in this case are Medicare or Medicaid claims for items or services which, to the extent they were provided, were provided by or incident to the services of Respondent Petrus during a period when he was suspended from participation in Medicare and Medicaid."] ALJ's Decision at 7-18.

The Respondents maintained that the ALJ based his findings on the fact that Dr. Petrus' handwriting appears on the patients' charts. The Respondents asserted that Dr. Petrus' handwriting appears there because Dr. Malsky and Dr. Baer left the charts incomplete. To the extent that the ALJ found that the services in question were not performed on days when either Dr. Malsky or Dr. Baer were present, the Respondents alleged clerical errors in recording the dates of service. Additionally, the Respondents reasoned that since Dr. Petrus never left a chart incomplete, those charts that were incomplete could be attributed to Dr. Malsky or Dr. Baer and would naturally show some handwriting by Dr. Petrus reflecting his attempts to fill in the omitted information. Respondents' Br. at 44. The ALJ's findings are fully supported by the evidence in the record. In general that evidence relied on by the ALJ shows that the items or services in issue were either

furnished by Dr. Petrus and claimed using his provider number, or provided by Dr. Petrus, directly or otherwise, and then claimed for reimbursement using the other physicians' provider numbers. See ALJ's Decision at 7-18.

The Respondents' assertions on appeal are essentially testimony in the guise of argument. The Respondents did not previously present any credible evidence, nor elicit testimony during the hearing, which could be interpreted as even marginally refuting the I.G.'s charges. The I.G.'s evidence was overwhelmingly damning to the Respondents' assertions of innocence. Moreover, as the ALJ noted, in spite of the "massive evidence of . . . fraud and dishonesty" offered by the I.G., Dr. Petrus elected not to testify in his own behalf. The ALJ reasonably drew a negative inference from that fact. ALJ's Decision at 38. Accordingly, we affirm and adopt FFCL Nos. 54-156.

FFCL No. 157. All 271 claims at issue in this case are Medicare or Medicaid claims for which payment may not be made, because they were claims for items or services which, to the extent they were provided, were provided by or incident to the services of Respondent Petrus during a period when he was suspended from participation in Medicare or Medicaid. ALJ's Decision at 18. The Respondents' arguments here are based on their earlier exceptions to FFCL Nos. 30, 44, 51, and 54-156. Respondents' Br. at 45. Having considered and rejected those arguments earlier in this part, we need not consider them again. We affirm and adopt FFCL No. 157.

FFCL No. 158. The items or services stated in the claims enumerated in counts . . . [specific enumeration of counts omitted] were not provided as claimed because the claims falsely represented the identity of the physician who was claimed to have provided the items or services. ALJ's Decision at 18.

The Respondents' exception is based on their position that since the items or services claimed were actually provided to the patients, there is no basis for a CMPL violation. This is a reiteration of arguments which we have already considered and rejected. Supra at Part I, section 5.A. Accordingly, we affirm and adopt FFCL No. 158.

FFCL No. 161. Respondent Petrus instructed his office staff that, once a new physician was hired, the retained claims were to then be filed, using the new physician's provider number to identify the provider of items or services. ALJ's Decision at 19.

The Respondents denied the substance of this finding. Rather, they asserted, Dr. Petrus instructed his staff to wait until they had obtained a provider number for Dr. Malsky before submitting claims for patients seen by him. The Respondents alleged that the testimony upon which the ALJ relied for this finding was taken out of context and supported by another witness who, they alleged, had embezzled from the Eye Center. The Respondents characterized the substance of this finding as a "myth" which was ultimately disproved at the hearing. Respondents' Br. at 46-47. The Respondents' version of the facts was presented through argument rather than testimony. The testimony relied on by the ALJ in arriving at this finding shows that in late May or early June 1983 Dr. Petrus instructed the Eye Center employee then responsible for generating Medicare and Medicaid claims to withhold all claims until a new doctor (Dr. Malsky) arrived and his provider number could be used. Tr. at 792-793. The claims to which this testimony refers were for services provided prior to the date Dr. Malsky began work at the Eye Center. Contrary to what the Respondents asserted, nothing in the context of this testimony undercuts the conclusion reached by the ALJ. Moreover, the Respondents' version of the facts-- that Dr. Petrus was only instructing the Eye Center staff to hold claims generated between the time Dr. Malsky started seeing patients and the date on which Dr. Malsky obtained a provider number-

-is not consistent with the timing and circumstances of Dr. Petrus' instructions. The ALJ found the witnesses' testimony on this point to be credible. The Respondents' allegation that one witness offering this testimony had embezzled funds is an attempt to characterize as testimony a question which Dr. Petrus posed to a witness at the hearing. Tr. at 1589-1592. Accordingly, we affirm and adopt FFCL No. 161.

FFCL No. 164-176. [Generally, these FFCLs state that Dr. Petrus instructed his staff to change provider numbers on claim forms (from his to Dr. Malsky's) to make it appear that Dr. Malsky had provided services when, in fact, Dr. Petrus had provided them.] ALJ's Decision at 19-20.29/

In attacking these FFCLs, the Respondents relied, virtually exclusively, on the one-word of testimony by the Eye Center employee responsible for generating Medicare and Medicaid claims. The Respondents noted that when asked if Dr. Petrus gave her specific instructions as to how to resubmit claims using Dr. Malsky's provider number, she replied "No." Respondents' Br. at 47, citing Tr. at 1164. The Respondents ignore the fact that, just prior to the testimony they cite, this employee testified that when she alerted Dr. Petrus to the fact that claims by him had been rejected because he was no longer a certified provider, he specifically instructed her to resubmit them using Dr. Malsky's provider number. Tr. at 1162-1164. The Respondents did not refute this testimony. The testimony they cited refers to the actual method of resubmitting the claims, not to whether the resubmission was directed by Dr. Petrus. Accordingly, we affirm and adopt FFCL Nos. 164-176.

29/ The I.G. suggested that we modify FFCL No. 164 on the basis that Dr. Petrus did not instruct his employee to "change" the provider number on any claim. I.G.'s Br. at 69. We do not find it necessary to make this modification. The ALJ reasonably inferred that the instruction Dr. Petrus gave, in effect, was an instruction to change the provider number since the claims had already been submitted with Dr. Petrus' number and he instructed his employee to resubmit them using a different provider number.

FFCL No. 177-178. [These FFCLs find that Dr. Petrus did not instruct his staff to stop identifying Dr. Malsky as the provider of services on certain Medicare and Medicaid claims by the Eye Center after Dr. Malsky brought evidence of incorrect claims to Dr. Petrus' attention. Additionally, even after notice by Dr. Malsky, the Eye Center did not cease filing claims incorrectly identifying Dr. Malsky as a provider of services.] ALJ's Decision at 20-21.

The Respondents denied that Dr. Petrus told his staff to resubmit claims, previously listing him as the provider, by altering the claims to show Dr. Malsky as the provider. The Respondents attacked the logic of these FFCLs, noting that Dr. Malsky did not start at the Eye Center until mid-June 1983. The Respondents (based on their assertion that Dr. Petrus was not informed of his suspension until June 1983) contended that Dr. Petrus had told the employee responsible for generating the claims that those between May 12th and June 15th would not be reimbursed due to his suspension. The Respondents alleged that, contrary to the ALJ's findings, the resubmission of the claims, including alteration of the provider number, was carried out by an employee acting on her own volition. Respondents' Br. at 47-48.

The record does not support the Respondents' arguments. As we have noted elsewhere, Dr. Petrus cannot credibly deny that he knew that his suspension from Medicare and Medicaid was effective on May 12, 1983. The Respondents' citation to pages 826-827 of the hearing transcript in support of their argument on notice is bootstrapping. The alleged support there consists of Dr. Petrus cross-examining a witness and interjecting his version of the supposed date of notice. The witness, not having been a party to the 1983 suspension, testified only, and generally, as to when she learned of the suspension. Similarly, the testimony cited for the proposition that Dr. Petrus informed his employee that the May 12 - June 15 claims would not be paid due to his suspension (Tr. at 1203) does not support the Respondents' assertions. Basically, that testimony

consists of Dr. Petrus suggesting a sequence of events to a witness who cannot recall or remember the "facts" as set out by Dr. Petrus during his cross-examination.30/ So far as the Respondents' assertion that an Eye Center employee resubmitted claims on her own, the testimony makes it clear that, while the manner in which she physically altered those documents may have been her own, she altered and resubmitted the claims at the direction of Dr. Petrus. Accordingly, we affirm and adopt FFCL Nos. 177-178.

FFCL No. 188-191. [These FFCLs state that Dr. Petrus asked Dr. Baer to lie to the grand jury regarding his relationship with Dr. Petrus and the Eye Center. FFCL Nos. 188-190. Additionally, FFCL No. 191 states that Dr. Petrus asked Dr. Baer to lie to Dr. Petrus' attorney.] ALJ's Decision at 22.

The Respondents characterized these FFCLs as "fiction," unsupported by the record. The Respondents alleged that, when faced with Dr. Baer's apparent inability to consistently recall facts, Dr. Petrus merely advised Dr. Baer to tell the grand jury, when he was uncertain about the facts, that he did not remember. The Respondents also alleged that Dr. Baer had, in fact, lied to the grand jury. Respondents' Br. at 48-49. The FFCLs are based on the transcripts of the conversations between Drs. Petrus and Baer. Concerning the allegation that Dr. Baer lied to the grand jury, the Respondents again relied on an interpretation of the hearing testimony taken out of context. The testimony relied on by the

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30/ The Respondents treated as "facts" Dr. Petrus' questions, asked in his capacity as his own lawyer. Because Dr. Petrus appeared pro se, the ALJ gave him considerably more leeway in presenting his case than might be afforded a member of the bar. This extended to his questioning and cross-examination of witnesses. While leading questions are permitted on cross-examination, it is apparent from the transcript that Dr. Petrus was attempting to testify through his exchanges with various witnesses, both his own and the I.G.'s. In effect, Dr. Petrus sought to interject his version of the facts into the record without subjecting himself to the test of cross-examination.

Respondents does not show that Dr. Baer presented false grand jury testimony. See Tr. at 382 and 385. Rather, it demonstrates an effort by Dr. Petrus to testify by interpreting documents while questioning a witness about them.31/ Accordingly, we affirm and adopt FFCL Nos. 188-191.

FFCL No. 193. Respondent Petrus altered records of surgeries that had been created by employees at Bailey Square (sic) in order to make it appear that Dr. Malsky had performed surgical procedures which, in fact, he had not performed. ALJ's Decision at 22.

The Respondents correctly noted, and the I.G. agreed, that Dr. Malsky never performed surgery at the Bailey Square Ambulatory Surgical Center (an outpatient facility). Rather, he operated at St. David's Hospital. The ALJ's references to the record show that in reaching this finding he was aware of this fact. We view the ALJ's error in referring to Bailey Square rather than St. David's as a harmless editorial error. We nonetheless modify the finding to accurately reflect the record. See Part III below.

The Respondents cited the testimony of a St. David's operating room nurse for the proposition that there were errors in the St. David's records in issue. The Respondents asserted that Dr. Petrus and Dr. Malsky were co-surgeons for the claims at issue and that any changes to the hospital records were made to reflect that fact. Respondents' Br. at 49.
The testimony of the St. David's nurse, relied on by the Respondents, is general in nature and addresses the manner in which operating room records are filled out. See Tr. at 151-152, 155-156, 162-163, and 170. It does not specifically

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31/ Additionally, the Respondents' argument ignores the fact that, in 1985, Dr. Petrus pled guilty to one count of obstruction of justice based on his efforts to convince Dr. Baer to lie to the grand jury. See I.G. Exs. 106 and 107.

rebut the testimony of Dr. Malsky on this issue and the documentary evidence cited by the ALJ. See I.G. Exs. 145, 146; Tr. at 495, 739-740. Accordingly, we affirm and adopt FFCL No. 193, as modified in the Appendix.

FFCL No. 196. Respondent Petrus knew that the suspension became effective May 12, 1983. ALJ's Decision at 22.

The Respondents again asserted that their only notice of suspension was contained in the May 31, 1983 Order of Dismissal of the administrative proceeding involving Dr. Petrus, i.e., his 1982 suspension. The Respondents contended that this established that they were not notified of the suspension until some time in June 1983 so that all Medicare and Medicaid claims made until "the early part of June" were valid.

We have already considered and rejected the Respondents' arguments on this issue. Supra at Part I, section 5.C. We note moreover that, although they have asserted repeatedly that they were not notified of the suspension until June 1983, the Respondents offered no evidence of notice on a specific date in June 1983 to support their claim. We therefore affirm and adopt FFCL No. 196.

FFCL No. 197. Respondent Petrus knew that he could apply for reinstatement upon completion of his suspension but that he would not automatically be reinstated. ALJ's Decision at 22.

The Respondents argued that Dr. Petrus' 1983 suspension was a violation of due process. The Respondents alleged that HCFA assured Dr. Petrus that he would be reinstated in six months, on November 12, 1983. Generally, the Respondents maintained that since the Government violated this contract, Dr. Petrus' suspension was invalid. The Respondents also raised some of the other challenges to his suspension (Respondents' Br. at 49-50) which we have previously

addressed in this decision. Supra at Part I, section 5. There is absolutely no merit to these arguments. The agreement leading to Dr. Petrus' May 12, 1983 suspension provides:

4. Dr. Petrus may petition for reinstatement in the Medicare program up to ninety (90) days before the end of the six month period . . . Dr. Petrus will be reinstated barring any obstacle. Health Care Financing Administration represents it does not know of any pending investigation or regulatory obstacle at this time. I.G. Ex. 102 at 4.

The agreement did not, as the Respondents asserted, provide that reinstatement would be automatic. Rather, the agreement clearly put Dr. Petrus on notice that an investigation could be an obstacle to his reinstatement. See 42 C.F.R. 420.112, 420.120 (1982). At the time of the agreement, there were no ongoing investigations concerning Dr. Petrus. However, the record shows that, as early as August 1983, the I.G. was once again investigating Dr. Petrus' activities. Tr. at 1280-1288. Thus, there was an obstacle present to Dr. Petrus' request for reinstatement in November 1983. Accordingly, we affirm and adopt FFCL No. 197.

FFCL No. 201. Respondent Petrus admitted that he had willfully and knowingly made false statements in representation of material facts for use in determining his rights to Medicare and Medicaid benefits. ALJ's Decision at 23.

The Respondents contended that Dr. Petrus had stated in court that he never knowingly or willfully submitted any false claim forms to the Government. They argued that this fact alone nullified the acceptance of any guilty plea. The Respondents reasserted that the problems with these claims arose due to "solitary" activities of an Eye Center employee. They again contended that the claims are valid since the services were actually provided. The Respondents' arguments have no merit. This FFCL is based on Dr. Petrus' admission as set out in his

re-arraignment transcript. I.G. Ex. 109. In the portion of the transcript cited by the ALJ, Dr. Petrus plainly admits that he had willfully and knowingly made false statements in representation of material facts for use in determining his rights to Medicare and Medicaid benefits. Id. at 25-27. The transcript shows a clear admission of guilt to three counts of the indictment. The portion of the transcript upon which the Respondents relied involves a discussion, between Dr. Petrus and the judge, relative to Count 15 of the indictment, to which no plea was entered. Id. at 16-17. Thus, the statement offered by the Respondents in their exceptions is completely irrelevant to the factual basis for FFCL No. 201. Regarding the six claims involved in the counts to which Dr. Petrus pled and the other 265 claims, we have considered and rejected the Respondents' assertion that the claims were valid since the services were provided. Moreover, we have sustained the ALJ's findings and conclusions regarding Dr. Petrus' liability. Supra Part I, section 5. Accordingly, we affirm and adopt FFCL No. 201.

FFCL No. 202-203. [These FFCLs state that Dr. Petrus directed the Eye Center and its employees to falsely claim reimbursement for items or services (as enumerated in FFCL No. 202), and that Dr. Petrus knew that the Eye Center employees were executing his instructions to falsify claims.] ALJ's Decision at 23. The Respondents asserted generally that the findings and counts upon which these FFCLs are based are, in fact, unrelated to them and that the hearing testimony fails to support them as well. Rather, the Respondents alleged, two Eye Center employees determined who treated each patient, without any input from Dr. Petrus. Respondents' Br. at 52.

The Respondents offered no support or cogent explanation for their general assertions regarding the basis of these FFCLs. The ALJ reasonably found that these FFCLs were proven by a preponderance of the evidence. Conversely, there is simply no basis in the record to support the Respondents' repeated assertions that the trouble they encountered was the fault of

negligent or irresponsible employees of the Eye Center (other than Dr. Petrus). We affirm and adopt FFCL Nos. 202 and 203.

FFCL No. 204-211. [In general, these FFCLs state that the Respondents "knew," "had reason to know," and "should have known," that the items and services enumerated in these FFCLs were not provided as claimed.] ALJ's Decision at 23-25.

The Respondents indicated that these exceptions were reiterations of their earlier arguments that their actions did not violate the CMPL. We considered and rejected the Respondents' arguments in Part I, section 5 of this analysis. We incorporate that analysis here and reject these specific exceptions. Consequently, we affirm and adopt FFCL Nos. 204-211.

FFCL No. 212. The Respondents presented or caused to be presented all 271 claims at issue in this case in violation of the Act. ALJ's Decision at 25.

The Respondents insisted that the ALJ erred by not establishing liability for each Respondent. The Respondents again argued that the ALJ's decision was wrong because: the Eye Center was never suspended; Dr. Petrus never signed any claim forms; the services claimed were provided to each patient; and a specific dollar amount of liability for each Respondent was not established. Respondents' Br. at 52. We have considered and rejected these arguments elsewhere in this analysis. Supra at Part I, section 5. We incorporate the pertinent aspects of that analysis here and reject this specific exception. We affirm and adopt FFCL No. 212.

FFCL No. 213. The amount claimed by the Respondents in the 271 claims at issue exceeded $40,000. ALJ's Decision at 25.

The Respondents argued that the I.G. was "unsure" of the amount of money involved. The Respondents asserted that, based on the statement of an I.G. witness and the I.G.'s brief, the amount of money involved is closer to $22,000. The Respondents claimed that the Government has been unjustly enriched since the services were provided and the doctors (Malsky and Baer) were paid, while money has been withheld from the Respondents. Given these claims and their assertion that the damages awarded by the ALJ (totalling $180,000) are more than eight times greater than the money involved, the Respondents argued that the Double Jeopardy Clause of the Fifth Amendment has been violated. Respondents' Br. at 52-53.

The Respondents' arguments are not persuasive. The testimony upon which the Respondents relied comes from an employee of Blue Cross/Blue Shield of Texas who testified that she was unsure of the amount of funds "withheld" from the Eye Center. Tr. at 1081. This is not necessarily the same as the amount that was improperly claimed.32/ The Act does not require the I.G. to prove a specific overpayment prior to establishing a violation. See Frazier at 27, citing section 1128A(a) of the Act. Moreover, we have considered and rejected the Respondents' double jeopardy arguments and nothing here would cause us to reconsider that analysis. Accordingly, we affirm and adopt FFCL No. 213.

FFCL No. 214-222. [These FFCLs cite the ALJ's authority to impose penalties and assessments after considering any mitigating or aggravating circumstances. They also cite a respondent's burden of proof to establish mitigating factors. They state that the Respondents were participating in a scheme

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32/ The I.G. explained that since the Eye Center was not suspended, checks for services identified as being performed by a physician other than Dr. Petrus would not have been retained by the fiscal agents processing the checks. I.G.'s Post-Hearing Br. at 179-180, n.28.

to defraud Medicare and Medicaid, that the dollar amount at issue here is substantial, and that the Respondents showed contempt for both programs, as well as the beneficiaries and recipients of those programs, so the Respondents had a high degree of culpability for their actions.] ALJ's Decision at 25-26.

The Respondents offered no substantive argument, but merely alleged that the ALJ "regularly supported the position of his employer . . . ." Respondents' Br. at 53. Presumably, the Respondents were implying that the ALJ was employed by the I.G. They provided no support for this implication (and we are personally aware that it is incorrect because the ALJs are organizationally separate from the I.G. and are not employed by the I.G.). The mere fact that the ALJ's findings are consistent with the I.G.'s position is no reason for overturning those findings. We affirm and adopt FFCL Nos. 214-222.

FFCL No. 223-227. [These FFCLs state that Dr. Petrus was convicted in 1979 of a Medicaid-related criminal offense, the claims in issue represent his second documented offense of fraudulent conduct relative to a federal health care program, the Government incurred substantial expenses, the Respondents fraudulently obtained substantial money, and the Respondents attempted to coverup their conduct.] ALJ's Decision at 26.

The Respondents asserted that Dr. Petrus' 1979 plea was withdrawn and cannot be considered a conviction here. They alleged that the current action is not a second case, but a continuing action against Dr. Petrus. They also denied that they attempted to coverup their activities. Respondents' Br. at 53-54.

As the I.G. noted, the question of the effect of Dr. Petrus' withdrawal of his 1979 nolo contendere plea was considered by an ALJ in the administrative proceedings relative to Dr. Petrus' 1983 suspension. The ALJ ruled in the Government's favor. See I.G.'s Br. at 89; see also I.G. Exs. 101 and 102. The

Respondents are bound by that ALJ's ruling since they accepted a settlement agreement in that case rather than appealing. Moreover, the Respondents' mere denial of an attempt to coverup Dr. Petrus' activities is not a basis on which we would reverse the ALJ's FFCLs.
We affirm and adopt FFCL Nos. 223-227.

FFCL No. 228. It is not a mitigating factor that the false claims in this case were filed over a relatively short period of time. ALJ's Decision at 26.

The Respondents argued that the fact that the false claims were filed over a short period of time was a mitigating factor. Additionally, the Respondents asserted that the ALJ's failure to consider this fact as a mitigating factor was further evidence of his bias. Respondents' Br. at 54. The Act and implementing regulations require an ALJ to consider aggravating and mitigating factors in determining the amount of penalties and assessments to impose. See section 1128A(d) and 42 C.F.R. 1003.106. The Act does not specifically list the length of time over which claims are made as a factor to be considered. The regulations refer to "a short period of time" in the guidelines for determining the amount of the penalty or assessment, under "Nature and circumstances of the claim." Specifically, section 1003.106(b)(1) states:

It should be considered a mitigating circumstance if all the items or services . . . were of the same type and occurred within a short period of time, there were few such items or services, and the total amount claimed . . . was less than $1,000. (Emphasis added.) This is only a guideline, however, and, in any event, does not indicate that the period of time by itself is a mitigating factor. While the false claims here were all submitted within a period of about seven months, there were 271 items or services claimed, and the amount claimed was considerably more than $1,000.

Both the Act and regulations also specifically permit an ALJ to consider, in addition to listed factors, "other matters as justice may require." Here, the ALJ could reasonably determine that the period was not so short that justice required it to be considered a mitigating factor. This is especially evident since the Respondents provided no evidence that they stopped submitting false claims for any reason other than the fact that they were under investigation by the I.G. Further, as the ALJ noted, no sooner was Dr. Petrus suspended than he initiated his efforts to circumvent the suspension.

Since the ALJ was reasonable in not considering the period of time by itself to be a mitigating factor, his finding that there were no mitigating factors is not evidence of bias on his part. Accordingly, we affirm and adopt FFCL No. 228.

FFCL No. 229. The Respondents have not established that imposition against them, jointly and severally, of assessments of $80,000 and penalties of $100,000, will jeopardize their ability to continue as health care providers. ALJ's Decision at 26.

Citing Dr. Petrus' alleged permanent disability and his recent release from prison, the Respondents asserted that the ALJ's finding "flies in the face of reason." Respondents' Br. at 54. In imposing $80,000 in assessments, the ALJ stated that the "Respondents offered no evidence as to their financial condition." ALJ's Decision at 46. The Respondents did not assert here that they had provided such evidence. Dr. Petrus' alleged disability or imprisonment may have jeopardized his ability to continue as a provider, but that is irrelevant to the question presented under the statute: whether the imposition of an assessment and penalty will jeopardize their ability to continue.
Accordingly, we affirm and adopt FFCL No. 229.

III. The I.G.'s Proposed Technical Corrections

The I.G. proposed that we make certain revisions and corrections to the ALJ's decision. The I.G. labeled these proposed revisions and corrections as merely "technical." Specifically, the I.G. proposed that we modify FFCL Nos. 15, 54, 55, 59-64, 101, 126-128, 157, and 193 "to conform them to the evidentiary record." I.G.'s Br. at 75-76. The I.G. also identified editorial errors related to FFCL Nos. 152, 213, and 224.33/ In his ruling dismissing the I.G.'s exceptions as untimely, the ALJ stated:

[The proposed] revisions and corrections . . . [do not] rise to the level of exceptions. They do not affect the outcome or the substance of my decision . . . . Perhaps my decision would be more accurate and complete with these corrections and revisions, and for that reason I note that I have no basis to disagree with them.

Decision Dismissing Inspector General's Proposed Exceptions to Administrative Law Judge's Decision (December 12, 1990) at 3.34/

We gave the Respondents an opportunity to comment on the I.G.'s proposed revisions and corrections. The Respondents commented that-- it would be inappropriate to reply to the I.G.'s corrections and revisions of the ALJ's findings of fact, since that was the basis on which the ALJ relied in formulating his decision. If the ALJ's findings of fact

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33/ The I.G.'s proposed addition of FFCL No. 44a arguably goes beyond making a merely technical correction, and, in any event, we find it unnecessary to add such a finding.

34/ The ALJ apparently thought that, because exceptions to his decision had been filed, he did not have the authority to make the revisions and corrections himself. Ordinarily, a judge has inherent authority to correct clerical mistakes in his written decision at any point. In our view, the absence of any explicit limitation on the ALJ's authority meant that he had the authority to make such changes here, and should have done so.

are in error, it seems only logical that the decision is also in error. Respondents' Letter of January 25, 1991.

Contrary to what the Respondents said, the errors identified by the I.G. as "technical" are not errors in finding the facts; as the ALJ stated, they do not affect the outcome or the substance of his decision. These errors are merely typographical or editorial errors, primarily made in listing the counts at issue or in citing to all of the related exhibits. We note that the ALJ's Decision contains 230 detailed FFCLs and that the number of counts at issue (271) would make it extremely difficult to avoid making any error of this type. Our conclusion that the errors in listing counts were inadvertent and not substantive is consistent with the ALJ's overall findings on the total number of counts (174) for items or services provided by a physician other than Dr. Petrus and with a review of the supporting evidence. Moreover, the ALJ's failure to accurately list certain counts in the pertinent FFCLs at most affects material findings on eight of the 271 counts at issue. We would uphold the penalties and assessments here even if they were based on 263 counts, rather than 271 counts, since there is uncontradicted and credible evidence that the Respondents schemed to defraud the Medicare and Medicaid programs and to circumvent the requirements enacted to protect the integrity of those programs. Accordingly, we modify the FFCLs as indicated in the Appendix to this decision. We note that we do not adopt the language proposed by the I.G. for FFCL No. 15, but instead change the second sentence to reflect more accurately the wording of the applicable statutory and regulatory provisions regarding the effect of a suspension. Also, we decline to add findings related to counts 206-209, instead modifying FFCLs No. 150-152 to reflect what we find was an

inadvertent omission of those counts from those findings.35/

CONCLUSION

Based on the above analysis, we affirm the decision of the ALJ imposing $100,000 in penalties and $80,000 in assessments against the Respondents, Dr. Edward J. Petrus, Jr. and The Eye Center of Austin, jointly and severally. In doing so we affirm and adopt the 230 Findings of Fact and Conclusions of Law relied upon by the ALJ in reaching his decision, with the editorial modifications set out in the Appendix to this decision. Conversely, we reject each and every exception to those Findings and Conclusions taken by the Respondents.

Donald F. Garrett

Alexander G. Teitz

Judith A. Ballard
Presiding Panel Member

35/ The I.G. also asked us to strike from the record the exhibits the Respondents submitted with their exceptions. These exhibits included the notes between the ALJ and his assistant, the Malashenko decision and some related documents, and documents related to the 25-year suspensions of the Respondents. Since these exhibits were not submitted as evidence on disputed material facts, we see no need to strike them.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-4761

EDWARD J. PETRUS, JR., MD.
Petitioners,

v.

INSPECTOR GENERAL, DEPARTMENT
OF HEALTH & HUMAN SERVICES
Respondent

Petition for Review of an Order of the
Department of Health & Human Services
(C-147) (Decision 1264)

ON SUGGESTION FOR REHEARING EN BANC

July 1, 1992

Before HILL, KING and DAVIS, Circuit Judges

PER CURIAM

DENIED

FILED July 1, 1992.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-4761

EDWARD J. PETRUS, JR., MD.and
The Eye Center of Austin
Petitioners,

v.

INSPECTOR GENERAL, DEPARTMENT
OF HEALTH & HUMAN SERVICES
Respondent

Petition for Review of an Order of the
Department of Health & Human Services

Before HILL,[1] KING and DAVIS, Circuit Judges

PER CURIAM[2]

In this case, the Departmental Appeals Board of the Department of Health and Human Services held petitioners Petrus and the Eye Center of Austin jointly and severally liable for $80,000 in assessments and $100,000 in penalties for violations of the Civil Monetary Penalties Law, as amended, 42 U.S.C. § 1320-7a et seq.

Petrus and the Eye Center, a professional corporation

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[1] The Honorable James C. hill, Senior Circuit Judge of the Eleventh Circuit, sitting by designation.

[2] Local Rule 47.5

wholly owned by Petrus at the time the violations occurred, sought review in this court under 42 U.S.C. § 1320a-7a(e) by filing one notice of appeal naming both parties. The document was signed by Petrus. Petrus is not, however, a licensed attorney, and as such cannot represent the corporation even though he is its sole owner. In re K.M.A., Inc., 652 F.2d 398, 399 (5th Cir. Unit B 1981); *see also* Donovan v. Road Rangers Country Junction, Inc., 736 F.2d 1004, 1005 (5th Cir. 1984)(per curiam). In In re K.M.A., we observed that it was clear whether the filing of a corporation's notice of appeal by someone who is not an attorney deprives us of jurisdiction to consider the appeal. 652 F.2d at 399. Presented with the same situation in In re K.M.A. as confronts us here, we granted the appellee's motion to dismiss, except that we held that the appeal would not be dismissed if an attorney admitted to practice before this court entered an appearance for the corporation within thirty days.

The briefing notice in this case, issued on November 12, 1991, requested that the parties address this court's jurisdiction to entertain the appeal of the Eye Center. The notice directed the parties to In re K.M.A.. Citing inapplicable Texas law, Petrus maintains in his brief that a non-attorney may represent a corporation after the corporate charter has been forfeited. The Government, citing the authority of In re K.M.A., contends that we must dismiss the Eye Center's appeal unless it obtains licensed counsel within a time period set by this court. We find it unnecessary to give the Eye Center any more time to obtain counsel. The briefing notice clearly directed Petrus and the Eye Center to circuit precedent which indicated that a corporation must be represented by licensed counsel. Oral argument in this case is now scheduled for June 2, 1992. An order giving the Eye Center time to retain counsel would only cause needless delay in the disposition of this appeal. In short, the Eye Center has had its chance to comply with the law and has chosen at its peril not to do so.

Petrus also argues that the Department of Health and Human Services never obtained jurisdiction over the Eye Center

in the proceedings before the agency's Administrative Law Judge. Because we have no jurisdiction to hear the Eye Center's appeal, we do not address whether the agency properly obtained jurisdiction over it.

The appeal of the Eye Center of Austin is DISMISSED.[3]

[3] This order has no effect on the appeal of Petrus.

APPENDIX E

Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93,§ 15(a)-(e), 101 Stat. 698 provides:

SEC. 15. EFFECTIVE DATES.
42 USC 1320a-7

(a) In General - Except as provided in subsections (b), (c), (d), and (e), the amendments made by this Act shall become effective at the end of the fourteen-day period beginning on the date of the enactment of this Act and shall not apply to administrative proceedings commenced before the end of such period.

(b) Mandatory Minimum Exclusions Apply Prospectively - § 1128(c)(3)(B) of the Social Security Act (as amended by this Act), which requires an exclusion of not less than five years in the case of certain exclusions, shall not apply to exclusions based on convictions occurring before the date of the enactment of this Act.

* * *

Claims

(d) Physician Misrepresentations - Clauses (ii) and (iii) of section 1128A(a)(1)(C) of the Social Security Act, as amended by section 3(a)(1) of this Act, apply to claims presented for services performed on or after the effective date specified in subsection (a), without regard to the date the misrepresentation of fact was made.

QUESTIONS PRESENTED

1. Whether claims against petitioners for 271 items improperly presented under the Medicare and Medicaid programs are timely under the limitations period of the Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a-7a(c).

2. Whether the civil penalties imposed on petitioners violate the Double Jeopardy Clause of the Fifth Amendment.

3. Whether the civil penalties must be set aside because of the disclosure and use of grand jury materials in the CMPL proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-544

EDWARD J. PETRUS, JR. AND
THE EYE CENTER OF AUSTIN, PETITIONERS

v.

INSPECTOR GENERAL, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals dismissing the appeal of petitioner The Eye Center of Austin (Pet. App. D1-D3) is unreported. The order of the court of appeals affirming the decision of the Secretary (Pet. App. A) is also unreported, but it is noted at 966 F.2d 675 (Table). The final decision of the Departmental Appeals Board (Pet. App. B1-B69) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1992 with respect to petitioner The Eye

Center of Austin, and on June 3, 1992 with respect to petitioner Edward J. Petrus. A petition for rehearing on the court of appeals' decision with respect to petitioner Petrus was denied on July 1, 1992. Pet. App. C. The petition for writ of certiorari was filed on September 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. The Medicare program (Title XVIII of the Social Security Act, 42 U.S.C. 1395-1395ccc) is a federal health insurance program for elderly and disabled persons. Part B, involved here, provides a voluntary subscription program of supplemental medical insurance covering, in general, 80% of the reasonable charges for basic medical services. 42 U.S.C. 1395k, 1395*l*, and 1395x(s). The Medicaid program, created by Title XIX of the Social Security Act, 42 U.S.C. 1396-1396u, is a joint federal-state program designed to provide "medical assistance" to needy individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. 1396. A physician or entity may be barred

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[1] The appendix to the petition (Pet. App. D1-D3) does not reflect the date—May 28, 1992—on which the court of appeals issued its opinion dismissing the appeal of petitioner The Eye Center of Austin. The appendix to the petition (Pet. App. C) likewise omits a line in the court of appeals' order denying rehearing. That line identifies the order as to which rehearing was denied as the one issued on June 3, 1992, and it makes no reference to the court's earlier opinion dismissing the appeal of petitioner Eye Center. As we explain below (p. 8, *infra*,), because no rehearing of the May 28, 1992 order was sought, this Court lacks jurisdiction to entertain the petition insofar as it is advanced on behalf of petitioner Eye Center.

(*i.e.*, suspended or excluded) from participation in the Medicare and Medicaid programs for a variety of reasons, including being convicted of a criminal offense related to the Medicare or Medicaid program. 42 U.S.C. 1320a-7(a)(1); 42 C.F.R. 1001.122 (1991).

The Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a-7a *et seq.*, and its implementing regulations, 42 C.F.R. 1003.100 *et seq.* (1991), authorize the Secretary to impose civil monetary penalties, assessments, and/or exclusions against any person or entity who commits one of the enumerated offenses in 42 U.S.C. 1320a-7a(a)(1)(A)-(D). Thus, penalties may be assessed against any person who presents, or causes to be presented, a claim for an item or service under the Medicare or Medicaid program that the person "knows or should know was not provided as claimed." 42 U.S.C. 1320a-7a(a)(1)(A). The CMPL also authorizes such sanctions against a person who presents, or causes to be presented, a claim for an item or service performed by a physician during a period in which he is excluded from participation in the Medicare and Medicaid programs. 42 U.S.C. 1320a-7a(a)(1)(D). The statute further provides that the Secretary may impose a penalty of "not more than $2,000 for each item or service" improperly claimed and "an assessment of not more than twice the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim." 42 U.S.C. 1320a-7a(a).

The Secretary has delegated to the Department's Inspector General the responsibility for implementing the CMPL. 53 Fed. Reg. 12,993 (1988). Whenever the Inspector General decides to seek a penalty

or assessment or an exclusion under the CMPL, he must provide written notice to the person affected, who may then request a hearing before an Administrative Law Judge (ALJ). See 42 U.S.C. 1320a-7a (c)(2); 42 C.F.R. 1003.109 (1991). See also 42 C.F.R. 1003.111 through 1003.125 (1991) (outlining procedures for hearing) Persons adversely affected by the ALJ's determination may seek further review by the Secretary, who has delegated his authority to entertain such appeals to the Department Appeals Board (Board). See 42 C.F.R. 1003.125 (1991); 53 Fed. Reg. 25,543-25,544 (1988). The Board's final decision on behalf of the Secretary may then be appealed to the United States Court of Appeals for the Circuit in which the respondent resides or in which the claim was filed. 42 U.S.C. 1320a-7a(e); 42 C.F.R. 1003.127 (1991).

2. On June 7, 1989, the Inspector General issued a notice of proposed penalties and assessments under the CMPL against petitioner Petrus, an ophthalmologist, and petitioner Eye Center, a corporation wholly owned and operated by Petrus. The proposed penalties and assessments were based on the Inspector General's determination that between June 8, 1983 and February 27, 1984, petitioners submitted claims for 271 items or services performed by Petrus while he was suspended from participation in the Medicare and Medicaid programs, in violation of 42 U.S.C. 1320a-7a(a)(1)(D). That suspension stemmed from Petrus's 1979 conviction for tampering with a government document in the Texas Medicaid Program. In addition, the Inspector General determined that 174 of those 271 items were not provided as claimed, in violation of 42 U.S.C. 1320a-7a(a)(1)(A). Specifically, the Inspector General

concluded that those 174 items listed two other physicians, Dr. Baer and Dr. Malsky, as having performed services that in fact had been performed by Petrus. After a hearing, the Inspector General's liability determinations were upheld by the ALJ, who imposed $100,000 in penalties and $80,000 in assessments on petitioners—substantially less than had been sought by the Inspector General. Pet. App. B6-B10; B31-B32.

The Board affirmed the ALJ's decision in a lengthy opinion. Pet. App. B1-B69. As relevant here, the Board first rejected petitioners' contention that a five-year statute of limitations was applicable to the Inspector General's determination under the CMPL, and that accordingly the Inspector General's June 1989 action—which related to claims submitted by petitioners between June 1983 and February 1984—was time-barred. Pet. App. B12-B20. The Board noted that, as originally enacted, the CMPL contained no statute of limitations, though a five-year period had been adopted by regulation. Pet. B12-B13. On August 18, 1987, however, Congress amended the CMPL, effective September 1, 1987, to provide for a six-year statute of limitations. *Ibid.* (citing Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 3(b), 15(a), 101 Stat. 687, 698). Relying on the Tenth Circuit's opinion in *Bernstein* v. *Sullivan*, 914 F.2d 1395 (10th Cir. 1990), the Board concluded that the six-year limitations period applies to administrative proceedings initiated after the effective date of the amendments, September 1, 1987. Pet. App. B13-B15. Because the 1989 proceedings against petitioners were commenced within six years of petitioners' sub-

mission of the claims at issue, the Board rejected their statute of limitations defense.[2]

The Board similarly rejected petitioners' contention that the assessments and fines imposed by the ALJ violated the Double Jeopardy Clause of the Fifth Amendment (as construed in *United States* v. *Halper*, 490 U.S. 435 (1989)), in light of petitioner Petrus's 1985 Medicaid-related conviction. Pet. App. B47-B49.[3] The Board observed that no double jeopardy claim could be raised as to the vast majority of the 271 items at issue because only six of those items had been the subject to Petrus's 1985 criminal prosecution. *Id.* at B48. The proportionate amount of the total penalties and assessments attributable to those six items (6/271 of $180,000) was less than $4,000. The Board concluded that that amount bore a "reasonable relationship" to the government's loss of approximately $1,425. *Id.* at B48-B49. Accordingly, the Board held that those penalties and assessments were not improper under *Halper*. *Ibid.*

Finally, the Board rejected petitioners' claim that the Inspector General's use of grand jury materials

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[2] The Board also rejected petitioners' related contention that the docketing of the case before the ALJ was necessary to commence the action, noting that the CMPL expressly provides that actions thereunder may be "initiat[ed]" by "serving notice of the action," as the Inspector General did here. Pet. App. B18-B20 (citing 42 U.S.C. 1320a-7a(c)(1)).

[3] Based on claims submitted following the suspension of Petrus from the Medicare and Medicaid programs in May 1983, a federal grand jury began investigating his billing practices for those programs. Petrus eventually pleaded guilty to two counts of submitting false reimbursement claims involving six items or services, and to one count of obstructing justice. See Gov't C.A. Br. 8; Pet. App. B7.

pertaining to Petrus's criminal conviction violated Fed. R. Crim. P. 6(e)(3)(C)(i). Pet. App. B20-B24. Those materials had been obtained pursuant to a court order secured by the Inspector General (through an Assistant United States Attorney). *Id.* at B22. The Board noted that the district court that issued the order could reasonably have determined that use of the grand jury materials in the administrative hearing satisfied the Rule's provision authorizing disclosure "preliminarily to or in connection with a judicial proceeding." *Id.* at B23 (quoting Fed. R. Crim. P. 6(e)(3)(C)(i)). In any event, the Board noted that "the witnesses whose testimony was released were all present at the ALJ hearing and subject to confrontation and cross-examination." Pet. App. B23. The Board therefore concluded that "even if the grand jury materials were stricken from the record," it would nonetheless uphold the ALJ's decision because those materials were cited in connection with "relatively few" of the 271 items and were "for the most part * * * simply cumulative of other evidence in the record supporting the findings." Pet. App. B23, B24.

3. Petitioner Petrus sought review of the Board's decision in the United States Court of Appeals for the Fifth Circuit on behalf of himself and of petitioner Eye Center. On November 12, 1991, the court of appeals issued an order directing petitioners' attention to circuit precedent precluding a corporation from prosecuting an appeal without a licensed attorney. Pet. App. D2. Petitioners responded to that order by contending that Petrus was authorized to represent the Eye Center under state law. *Ibid.* Because the Eye Center failed to obtain licensed counsel, the court of appeals dismissed its appeal on

May 28, 1992. Pet. App. D1-D3. On June 3, 1992, the court of appeals summarily affirmed the Board's decision as to petitioner Petrus. Pet. App. A.

ARGUMENT

Petitioners renew their contentions relating to the applicable statute of limitations, the Double Jeopardy Clause of the Fifth Amendment, and the propriety of the Inspector General's use of grand jury materials. The decision of the Fifth Circuit rejecting those claims is correct, however, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. At the outset, the Court lacks jurisdiction to entertain petitioner Eye Center's claims because the petition was filed more than ninety days after the court of appeals' judgment dismissing its appeal. That judgment was entered on May 28, 1992. The court of appeals treated a subsequent petition for rehearing that challenged only the June 3, 1992 affirmance of the Board's decision—and not the prior dismissal of the Eye Center's appeal because of its failure to obtain counsel—as having been filed on behalf of petitioner Petrus alone. The petition for a writ of certiorari was filed on September 28, 1992, which was 123 days after the judgment became final as to petitioner Eye Center. Accordingly, the Court lacks jurisdiction to entertain the claims raised in the petition insofar as they are advanced on behalf of the Eye Center. See 28 U.S.C. 2101(c); *Department of Banking* v. *Pink*, 317 U.S. 264, 266-268 (1942).

2. In any event, the claims advanced in the petition do not merit review. Petitioners first contend (Pet. 6-11) that the Inspector General's action seek-

ing penalties and assessments was barred by a five-year statute of limitations. Petitioners concede that Section 3(b) of the Medicare and Medicaid Patient and Program Protection Act of 1987 (MMPPPA), Pub. L. No. 100-93, 101 Stat. 687, enacted a six-year statute of limitations for CMPL actions. Pet. 6-7. They contend, however, that the effective date of that statute of limitations is governed by Section 15(d) of the MMPPPA, which they interpret as applying the new limitations period only to claims submitted by a medical provider after September 1, 1987. Petitioners are mistaken. Section 15(d) of the MMPPPA by its terms is addressed solely to the amendments to the CMPL effected by Section 3(a)(1) of the MMPPPA (which relate solely to the type of conduct that may properly result in a provider's liability under the CMPL, see 101 Stat. 686-687), not to the statute of limitations enacted by Section *3(b)*. The effective date of Section 3(b) is governed by Section 15(a), which provides that the MMPPPA applies to "administrative proceedings commenced" after September 1, 1987. Because the Inspector General indisputably commenced the administrative proceedings against petitioners after that date, the court of appeals correctly concluded that the Inspector General's action was not time-barred.[4]

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[4] The court of appeals' affirmance of the Board's ruling that Section 15(a) governs the effective date of the statute of limitations enacted by Section 3(b) of the MMPPPA is in agreement with the decision of the only other court of appeals to consider the question. See *Bernstein* v. *Sullivan*, 914 F.2d 1395, 1398-1400 (10th Cir. 1990). Petitioners attempt to distinguish *Bernstein* (Pet. 9) on the ground that Dr. Bernstein did not provide any services at all, whereas petitioners provided services under false pretenses. The specific grounds on

There is no force to petitioners' claim (Pet. 6, 11) that the decision of the court of appeals conflicts with this Court's decision in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bowen*, the Court held that the Secretary may not promulgate retroactive rules setting the levels of cost reimbursements under the Medicare Act. *Id.* at 209-215. That decision was based on the conclusion that Congress did not authorize the retroactive rule at issue. The Court in *Bowen* reaffirmed, however, the well-settled principle that enactments of Congress will be given retroactive effect when "their language requires this result." *Id.* at 208. Because the six-year period applied to petitioners was required by the plain language of the MMPPA, and not by an agency rule, *Georgetown University Hospital*, far from conflicting with the decision of the court of appeals, strongly supports it.

3. Petitioners next contend (Pet. 11-13) that the penalties and assessments imposed against them are improper under this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989). That contention, too, is meritless. *Halper* held that the imposition of

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which liability was predicated in *Bernstein*, however, are irrelevant to the court's analysis of the statute of limitations issue. Equally unavailing is petitioners' attempt to distinguish *Bernstein* on the ground (Pet. 9-10) that Dr. Bernstein and the Inspector General had agreed to toll the statute of limitations as to some claims. That agreement, too, was irrelevant to the court of appeals' analysis of the statute of limitations issue, because many claims were already beyond the five-year limitations period when the agreement was executed and, as to the other claims, the proceedings were commenced after expiration of the tolling agreement and more than five years after accrual. *Bernstein*, 914 F.2d at 1398-1399.

civil penalties for conduct that was previously the subject of a criminal conviction may violate the Double Jeopardy Clause of the Fifth Amendment in "the rare case" where it subjects "a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The Court made clear, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446; *id.* at 452-453 (Kennedy, J., concurring). Here, neither petitioner was ever criminally prosecuted for 265 of the 271 items at issue, and thus no double jeopardy could possibly arise as to those items. *Id.* at 450. While Petrus had previously been convicted in connection with the remaining six items, the amount of penalties and assessments attributable to those few claims (approximately $4,000) bears a manifestly reasonable relationship to the government's damage in overpayments (approximately $1,400) and related costs of investigation, and is therefore not punitive under this Court's analysis in *Halper*.[5]

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[5] To the extent petitioners contend that *Halper* requires an accounting or precise proof of the government's damages (Pet. 12-13), they are once again mistaken. *Halper* teaches that no actual proof of damages is necessary unless and until the penalties imposed are overwhelmingly disproportionate to any estimated loss. *United States* v. *Halper*, 490 U.S. at 449.

Nor is there force to petitioners' claim (Pet. 12) that the Fifth Circuit's earlier decision in *United States* v. *Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), cert. denied, 113

4. Finally, petitioners renew their argument (Pet. 13-16) that disclosure to the Inspector General of materials gathered by the grand jury that investigated and indicted Petrus was improper under Fed. R. Crim. P. 6(e). Petitioners concede, as they must (Pet. 14-15), that Rule 6(e)(3)(C)(i) expressly authorizes disclosure of matters occurring before the grand jury "preliminarily to or in connection with a judicial proceeding." They contend, however, that a hearing before an ALJ to adjudicate penalties and assessments pursuant to the CMPL does not meet that test under this Court's decision in *United States* v. *Baggot*, 463 U.S. 476 (1983). That contention does not warrant review.

First, *Baggot* held that disclosure of grand jury materials for use solely in a purely investigative IRS audit of civil tax liability is not authorized by Rule 6(e)(3)(C)(i), but expressly declined to pass on the permissibility of such disclosure in connection with other administrative schemes, especially where they require resort to courts. *United States* v. *Baggot*, 463 U.S. at 482. The ALJ hearing prescribed under the CMPL scheme is an adjudicative, not investigatory, proceeding, and it is subject to judicial review. The hearing therefore differs significantly from the internal audit at issue in *Baggot*. Second, the Board found—and petitioners do not dispute—that the

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S. Ct. 123 (1992), is inconsistent with its decision in this case. In *Sanchez-Escareno*, the court held that a criminal defendant's execution of promissory notes for civil forfeiture fines prior to the criminal proceeding does not constitute multiple punishments for purposes of double jeopardy. 950 F.2d at 201-202. Because the government had not actually collected on the notes, there was no "second" sanction that could be characterized as punitive. *Ibid.*

grand jury materials used by the Inspector General here were duplicative of the overwhelming testimonial and documentary evidence introduced at the hearing, and thus their allegedly improper disclosure did not prejudice petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-544

In the Supreme Court of the United States

October Term, 1992

Edward J. Petrus, Jr., M.D.
and
The Eye Center of Austin
Petitioners,

v.

Inspector General
Department of Health and Human Services
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the agency can retroactively apply a six-year statute of limitations for a Civil Monetary Penalty Law (CMPL) claim after the applicable five-year limit expired?

2. Whether a CMPL penalty after a criminal conviction and fine for the same conduct violates the Double Jeopardy Clause of the Fifth Amendment?

3. Whether the release of grand jury materials for use in a civil administrative hearing is a due process violation?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Supreme Court Rule 15.6, this reply brief is presented.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Supreme Court regarding retroactivity of Medicare statutes.

At page 8 of its response, the government states that this Court lacks jurisdiction to entertain Petitioner Eye Center's claims. On page 2, in the text accompanying footnote 1 of the government's response, reference is made to the untimeliness of the petition by the Eye Center. It is clear from the Appellate

Court's final judgment filed June 3, 1992, and the denial of the rehearing en banc filed on July 1, 1992, which affirmed any prior decisions, that the order dismissing the Eye Center is incorporated in that judgment and thus the appeal to this Court is timely.

The only issue of jurisdiction is the validity of the judgment rendered against the Eye Center without the government ever serving notice on the corporation. The Secretary of State for the State of Texas certified that no service was made on the corporation. See App. Br. App. Ex. A-1. The June 7, 1989, letter from the agency to impose a penalty and assessment, which the government conceded is required under the CMPL (Res. Br. p.4), was only served on Petrus. See App. Br., App. Ex. A-2. No service was obtained on the Eye Center as claimed by the government on page 4 of their response. The request for a hearing was made solely by Petrus. See App. Br. App. Ex. A-3. The docketing notice from the agency of August 17, 1989, was only addressed and served on Petrus. See App. Br. App. Ex. A-4. The agency decision should be vacated because the agency lacked jurisdiction to proceed due to their failure to serve all parties.

At page 7 of its response, the government questions whether the owners of the corporation's assets may prosecute or defend actions against the corporation in courts as may be necessary to protect their property rights. The State of Texas says yes. By dismissing the Eye Center, the Court of Appeals for the Fifth Circuit violated the due process clause of the Fourteenth Amendment, by denying a citizen a privilege which the state had clearly told him was available to him.

At page 9 of its response, the government asserts that Section 15 of the MMPPPA, which amended the effective date of the new statute of limitations, applies to administrative proceedings commenced after September 1, 1987. However, the actual wording of the statutory amendment:

> the amendments made by the Act shall become effective at the end of the fourteen-day period...

clearly establishes that the start of the six-year statute of limitations is for claims filed after that date.

In a recent decision, **Gersman v. Group Health Ass'n, Inc.**, 975 F.2d 886 (D.C. Cir. 1992), the court considered whether a subsection to an Act applies retroactively for conduct occurring prior to its enactment. The court held that:

> It is the general rule that substantive statutory amendments do not apply to pre-amendment conduct. This holding is consistent with **Bradley**[1] and **Thorpe**[2], which dealt with remedial and procedural amendments. The present case concerns a substantive amendment and pre-amendment conduct. The rights of the parties must be adjudicated as they were under the law prevailing at the time of the conduct.

Gersman, 975 F.2d at 900.

The **Gersman** court also discussed the "take effect upon enactment" language. If applied to this statute it would indicate that September 1, 1987, is a beginning point from which date the Act and its amendments would be operative, but having no effect on events occurring before that date, and cited **Patterson v. McLean Credit Union**, 784 F.Supp. 268, 273-74 (M.D.N.C. 1992). Accord **Franklin v. New Mexico**, 730 F.2d 86, 87 (10th Cir. 1984)(statutory language that "amendments made by this section shall become effective on the date of the [statute's] enactment ... indicate[s] an intent for prospective application of the amendment.").
Gersman, 975 F.2d at 889.

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[1]**Bradley v. School Board**, 416 U.S. 696 (1974).

[2]**Thorpe v. Housing Authority of Durham**, 393 U.S. 268 (1969).

At page 9, in the text accompanying footnote 4, the government cited **Bernstein v. Sullivan,**[3] as supporting a retroactive statute of limitations. That case is distinguished as the court noted that:

> Because the five-year period was about to expire, the Inspector sought, and secured, from Dr. Bernstein an agreement dated March 31, 1987, which tolled the running of the five-year statute of limitations.

Bernstein, 914 F.2d at 1398.

and that:

> Thereafter, the parties agreed to stipulated facts and waived a hearing. Both parties agreed that the Administrative Law judge could enter judgment against Dr. Bernstein ...

Bernstein, 914 F.2d at 1399.

In the instant case, there was no tolling of the five-year statute of limitations or stipulation to any facts. Any retroactive application of the statutes is contrary to the prospective interpretation of **Gersman**, which is founded in **Bowen.**[4]

At page 3 of the government's response, the government described a violation of 42 U.S.C. § 1320a-7a(a)(1)(A) as a claim for an item or service that the person "knows or should know was

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[3]914 F.2d 1395 (10th Cir. 1990).

[4]**Bowen v. Georgetown University Hospital**, 488 U.S. 204 (1988).

not provided as claimed."[5] The government alleges 174 claims were not provided as claimed (Res. Br. p.4). It is mandatory that the government, in proposing a violation of the CMPL under § 1320a-7a(a)(1)(a) prove that the item or service was not provided to the patient. The CMPL, § 1320a-7a(i) defines "item or service:

> The term "item or service" includes (A) any particular item, device, medical supply, or service **claimed to have been provided to a patient** and listed in an itemized claim for payments. (emphasis added).

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[5]The government admitted that they substituted the "knows or has reason to know" provision for "knows or should know." (Pet. App. B33, n.22). This substantive amendment changed the status of liability under the CMPL. The CMPL requires as a condition of imposing liability on the principal that the principal himself possess the requisite knowledge. The term "reason to know" is defined in the *Restatement (Second) of Torts* § 12 (1965) and *Restatement (Second) of Agency* § 9 (1957) to mean that an actor actually has information from which a person of reasonable intelligence would infer that the fact in question exists. The term "reason to know" implies that the actor is under no duty to ascertain that information. **Burgess v. Montgomery Ward and Co.**, 498 F.2d 495, 498 (10th Cir. 1959). The duty to investigate further arises only after the actor actually learns of the pertinent information. The information gathered by Ms. Motes, an agent for the IG, was never shared with the Petitioners, so they were never informed of any noted deficiencies. The clear language of the CMPL expressly precludes the application of the doctrine of vicarious liability, and the imposition of damages - compensatory or exemplary. **Inspector General v. Frank P. Silver, M.D.**, No C-19, (1988).

The terms "not provided"[6] refers **only** to the item or service, and must be defined in the ordinary meaning as **not furnished or supplied.**[7] Any enlargement of the interpretation of "not provided as claimed" by the government is without foundation and contrary to the definition provided by the statute. The Inspector General in their brief stated: "[t]here was no evidence at the trial which suggested that Respondents billed for any services that were not in fact provided." (IG Br. p.96). The government has no standing to maintain a claim for a violation of § 1320a-7a(a)(1)(A) of the CMPL.

At page 3 of the government's response, they described a violation of 42 U.S.C. § 1320a-7a(a)(1)(D) as a claim for an item or service performed by a physician during a period in which he is excluded from participation in the Medicare and Medicaid programs. The government alleges 271 improper claims by the Eye Center (Res. Br. p.4) in violation of § 1320a-7a(a)(1)(D). All the claims were submitted by the Eye Center, a viable corporation in the State of Texas, which was never suspended from Medicare or Medicaid, therefore the government's claim is unfounded.

II. The Court of Appeals for the Fifth Circuit has affirmed an agency decision regarding the issue of double jeopardy for criminal and civil punishment for the same offense contrary to their prior decisions and in conflict with a decision of this Court.

At page 11 of its response, the government asserts that while Petrus had previously been convicted, neither petitioner was criminally prosecuted for 265 of the 271 items at issue, and that no double jeopardy could arise. However, the government failed

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[6]A search of Westlaw did not disclose any federal or state cases that provided a definition of these terms.

[7]Webster's New World Dictionary, p.1144, 2nd Ed, 1974.

to mention that the plea agreement signed on May 2, 1985, discharged both Petrus and the Eye Center from all claims between May 12, 1983 and May 2, 1985. The judge during sentencing also took into account all the alleged claims, which included the 265 claims noted by the government.

At page 11, in the text accompanying footnote 5 of the government's response, the government alleges that **Halper**[8] does not require an accounting of any losses. The Court however held that:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then **the defendant is entitled to an accounting of the Government's damages and costs** to determine if the penalty sought in fact constitutes a second punishment. (emphasis added).

Halper, 109 S.Ct. at 1902.

The **Halper** decision maintained that CMPL damages are limited to the amount of fraud itself, and the ancillary costs, such as the costs of detection and investigation. The government admitted that all the items or services claimed were provided (IG Br. p.96) thus voiding any actual damages. The government also refused to document any costs of detection and investigation in the discovery request. Therefore, any penalty constitutes double jeopardy under **Halper**.

In the same footnote, the government claimed that **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991), *cert.*

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[8]**United States v. Halper**, 490 U.S. 435 (1989).

denied, 113 S.Ct. 123 (1992) does not apply to this case. While **Sanchez-Escareno** involves the execution of a note promising to pay civil fines, an extensive discussion of the rationale underlying the double jeopardy principles expressed in **Halper** is detailed, upheld by the Fifth Circuit, and supportive of the petitioners position.

At page 6 of the governments response, the government created a formula and arrived at an amount they allege bore a "reasonable relationship" to the government's loss of approximately $1,425, and attribute this calculation proper under **Halper**. As noted previously, the government never proved any loss under the CMPL, and the government's novel formula is unfounded.

III. The Court of Appeals affirmed an agency decision regarding the release of grand jury materials contrary to their prior decisions, and contrary to the applicable decisions of this Court.

At page 13 of the government's response, the government alleges that the grand jury materials used by the Inspector General were "duplicative" of their evidence. Such a claim by the government is contrary to the "Ex parte application to disclose grand jury proceedings" filed February 9, 1990. In their motion the government stated that the records and business records of the petitioners "no longer exist other than those now in the grand jury records." One must question the veracity of the government's reply.

The introduction of grand jury materials in an administrative hearing violated Rule 6, and tainted the proceeding. At page 12 of the government's response, the government mischaracterized the CMPL hearing as adjudicative, when in fact the hearing is solely to determine the amount of penalty and assessments. By their own regulations, the ALJ does not have the authority to make decisions regarding the federal statutes or regulations. 42 CFR, Ch. V, § 1003.115(c). The ALJ is not conducting litigation, or preparing to conduct litigation, but conducting an administra-

tive hearing to determine the amount of penalty. The government conceded that **Baggot**[9] held that the disclosure of grand jury materials is not authorized by Rule 6(e)(3)(C)(i) for use in conducting a civil investigation to determine liability and to assess any deficiency. The CMPL hearing was investigative, since it used the hearing to determine any aggravating or mitigating facts in determining the amount of penalty to be administered.

CONCLUSION

The government's response is devoid of merit. The matters raised in this case have a significant impact on physicians and health care providers who participate in the Medicare and Medicaid programs, and therefore needs to be addressed by this Honorable Court. Therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

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[9]**United States v. Baggot**, 463 U.S. 476 (1983).